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Arrangements for Special London Meeting

AT the annual meeting of the American Bar Association at Minneapolis, Aug. 29-31, 1923, the invitation of the Bar and Law Society of England to hold a meeting of our Association in London in 1924 was accepted; and, accordingly our Executive Committee adopted a resolution which provided for the appointment by the President of a Committee on Arrangements and Transportation. Such Committee was duly appointed by President Saner and has presented a report to the Executive Committee relative to date of sailing, rates, etc.

The Committee reports that in presenting the invitation on behalf of the Bar and Law Society of England, the Rt. Hon. Sir Douglas McGarrell Hogg, K. C., H. M. Attorney General of Great Britain, stated that

> The legal sittings end here at the end of July and we would suggest that the middle of July would perhaps be a convenient time to enable us to show your members something of our procedure over here.

In order to meet the suggestion of the Attorney General, it was necessary for the Committee to select a date of sailing that would allow ample time to hold our 1924 *annual* meeting before the departure for London and after the national holiday July 4th. It was also necessary to select a date which would coincide with the date of sailing of a steamer that would not only provide suitable and adequate accommodations but would furnish them upon the most reasonable terms. The Committee found, upon conferring with the officials of the International Mercantile Marine Company, the United States Lines and the Cunard Steamship Company, that the above mentioned requirements were met by SS "Berengaria" of the Cunard Steamship Company, which is scheduled to sail on July 12th and to arrive in London about July 18th or 19th.

The Executive Committee has duly approved the report of the Committee.

The exact date and place of the *annual* meeting, however, have not yet been determined and will not be until the January meeting of the Executive Committee. The annual meeting will undoubtedly be held at some point on the Atlantic seaboard just prior to the departure for London.

The "Berengaria," the largest (tonnage 52,226) and one of the best appointed steamers of the Cunard fleet, provides first-class cabin accommodations for 900 persons, on all of which the Association is given an option. Her first-class accommodations are sufficient for 800 persons, two persons in each room. There are also a number of suites that will accommodate parties of three or more. There is secured for our members and their families a minimum rate, first-class cabin passage, of $270 per person, New York to Southampton. Those who desire the superior accommodations such as suites with bath and with toilet will, of course, be required to pay a sum in excess of the minimum rate of $270, such sum, however, to be determined by the Committee of the Association. This charge will be less than the regular rate for such accommodations.

No arrangements will be made for the return trip as a body but the committee will be glad to attend to all arrangements for return passage for our members on any steamer of any line.

The Committee suggests that those who desire to join in this most interesting pilgrimage to London and to avail themselves of the special rates and accommodations provided by the securing of the

"Berengaria" should, *as soon as possible*, communicate with Frederick E. Wadhams, 78 Chapel St., Albany, N. Y., stating the number of persons in their party, of whom composed and the kind of accommodations desired. Upon application to Mr. Wadhams such further information as may be requested will be furnished.

At the time the invitation of the Bar and Law Society of England was presented to the American Bar Association to hold a special meeting in London in the summer of 1924, a request was made by the Bar and Law Society of England that the Canadian Bar Association join them as hosts on the occasion of the visit of the American Bar Association to London, which invitation was formally accepted by the Canadian Bar Association at its annual meeting in Montreal in September.

Summarizing the above information, the chronological order of events next year will be as follows:

1. During week beginning July 6th and ending July 12th, regular annual meeting of the Association to be held at some point on the Atlantic seaboard, exact date and place to be hereafter announced.
2. July 12th, steamer "Berengaria" of the Cunard Steamship Line, sails from New York for Liverpool, arriving not later than July 19th.
3. During week beginning July 20th, and ending July 27th, special meeting of American Bar Association in London as guests of the English and Canadian Bar.

For a National Bureau of Police Information

THE tribute to the importance and efficiency of Scotland Yard as an aid to the administration of justice, contained in the report of the Committee on Law Enforcement, gives point to the efforts of the International Association of Police Chiefs to improve the methods of apprehending criminals in this country. According to Chief of Police Forrest Braden, of Louisville, Kentucky, who was present at the recent meeting of the American Bar Association, the Association of Police Chiefs wishes the establishment of a national bureau for the collection and distribution of police information and criminal intelligence, a commission for the study of crime, uniform classification of crime and extradition laws, uniform anti-narcotic laws, uniform automobile and traffic laws, and uniform laws governing firearms. The principal aim of the police organization, however, is the creation of the national bureau, which is regarded as the greatest need in police work today. The United States, according to Chief of Police Braden, is the only country in the world that has not provided a clearing house of criminal information. A national police bureau, authorized and operated by the U. S. Department of Justice, would not be an agency through which arrests are made.

The New Ambassador to St. James

ANOTHER ex-President of the American Bar Association has recently been signally honored by appointment to high official position. During the latter part of October President Coolidge named former Senator Frank B. Kellogg, of Minnesota, American Ambassador to the Court of St. James. Senator Kellogg accepted the post and it was announced that he would leave for London on November 10th. The new ambassador has been so long and favorably known in the public affairs of the nation that extended comment on his career would be superfluous. During his senate term he served as a member of the foreign relations committee and the interest in, and grasp of, international affairs there exhibited were among the reasons which induced President Coolidge to choose him for the important London post. He was admitted to the Bar in 1877, and in 1887 removed to St. Paul, where he formed a partnership with the late Senator Cushman K. Davis and Cordenio A. Severance. He was special counsel for the United States government in the case against the paper and Standard Oil trusts; special counsel for the Commerce Commission in the investigation of the Harriman railroads, and for the United States in the action to dissolve the Union Pacific-Southern Pacific merger; United States Senator from Minnesota, 1917-23. He was President of the American Bar Association, 1912-1923.

Bar Associations and Judicial Elections

SIGNAL vindication of the efforts of the Bar Associations of certain large cities to aid in the selection of fit judges is furnished by the results of recent judicial elections in Chicago, Illinois, and Cleveland, Ohio. In the former city nineteen out of the twenty-three recommendations of the Bar Association primary were followed, and one of the successful ones who was not recommended by the bar primary had nevertheless made a very strong showing in it. General satisfaction is expressed at the result. The judicial election in Chicago excited a degree of public interest that was astonishing to old campaigners and an unusually large vote was polled. The Bar Association recommendations were prominently displayed in the newspapers. The Chicago *Tribune* declared in an editorial before the election that while a bar primary was not infallible, on the whole it was a reliable guide and by far the best to be had. In Cleveland, nine candidates were recommended by the Association primary and seven of these were elected. The remaining two were defeated by candidates who are regarded as capable lawyers.

Additional Special Committees

PRESIDENT SANER has announced the appointment of the following special committees in addition to those already announced.

Use of Word "Attorneys"—William H. Lamar, Rockville, Md., Chairman; Charles V. Milay, Washington, D. C.; James R. Caton, Alexandria, Va.; J. P. Laffey, Wilmington, Del.; Chauncey G. Parker, Newark, N. J.

Increase of Judicial Salaries—Alexander B. Andrews, Raleigh, N. C., Chairman; Ashley Cockrill, Little Rock, Ark.; Beverly L. Hodghead, San Francisco, Cal.; Charles R. Brock, Denver, Colo.; Donald Fraser, Fowler, Ind.

Incorporation of American Bar Association—John B. Corliss, Detroit, Mich., Chairman; B. W. Parker, Washington, D. C.; W. O. Hart, New Orleans, La.; A. T. Stovall, Oklahoma, Miss.; S. T. Bledsoe, Chicago, Ill.

Practice in Bankruptcy Matters—Henry Deutsch, Minneapolis, Minn., Chairman; H. F. White, Chicago, Ill.; H. S. Drinker, Jr., Philadelphia, Pa.; Robert A. B. Cook, Boston, Mass.; Jacob M. Lashly, St. Louis, Mo.

Revision of Federal Statutes—Paul H. Gaither, Greensburg, Pa., Chairman; Charles M. Hepburn, Bloomington, Ind.; Middleton Beaman, Washington, D. C.; W. L. Sturdevant, St. Louis, Mo.; Thomas A. Jenckes, Providence, R. I.

Committee on Naturalization—See page 703.

RAILROAD VALUATION: A STATEMENT OF THE PROBLEM

Question Involved Is Whether Property and Its Value, Which Means Its Economic Equivalent, or Investment, Regardless of the Qualities of the Property Secured Thereby, Is to Be Protected—Changes in Theories Regarding Private Property—Value as an "Equitable Concept"—Supreme Court Decisions and Interstate Commerce Commission Procedure—Effect of "Recapture of Earnings"*

By Leslie Craven

Counsel, Western Group, Presidents' Conference Committee on Federal Valuation of Railroads

ONE of the most significant phases of present day thought is the change in current conceptions of rights in private property. The destruction of property in the war has accentuated the problem of the division of what property has remained. Europe has seen the creation of new governments recognizing a new method of division. In this country before the war the problem had been emphasized by the disappearance of free lands. The frontier, and a great new country in the West, had acted as a safety valve for industrial and social discontent. But in the two decades prior to the war, the frontier had vanished and free lands were almost gone. Discontented men could no longer go west. This constraint increased the pressure. That pressure was increased by the economic tension produced by the world war. Under these conditions a changed thought with reference to the rights in private property, has been reflected in new doctrines, which from a standpoint of the standards of ten years ago indicate evolution in the theory of the law of private property. As examples of what I mean, I refer to the decisions of the United States Supreme Court upholding the Adamson Law in settlement of the 1917 railroad strike, and with reference to the New York statute fixing rents.

Nations seem to pass through certain common stages of evolution. The wilderness is overcome and the territory is settled. Then rights of religious, social and political freedom are worked out and established. Then the problem of the settlement of the distribution of property is reached. Some nations have reached that epoch. Thus far none has passed through it. The American people have now reached it and are beginning the solution of the problem.

The work of public utility valuations is significant because there is in action here conflicting thought resulting from the conditions which I have suggested. There are now being weighed theories intended to curtail or destroy the rights of private property, and theories intended to preserve them. The problem is more acute in the valuation of railroad property than in the valuation of the property of such utilities as gas or electric light companies. In the valuation of the American railroads, the crux of the question of the theory of value, when reduced to its lowest terms, is the question to what extent the rights of private ownership in railroad property shall be recognized. Or, to be more specific, the question is shall the property, and its value,—that being the economic equivalent of the property—be protected, or is protection to be given not to the property at all, but to an investment in such property, irrespective of the qualities of the property secured by that investment. Stated more briefly the question is whether the Constitution protects the property or its cost.

As I have suggested, the accepted theories regarding private property have undergone changes. There can be no question as to what the conception was with which the regulation of public utility property was begun. The property was private property. It was, however, "affected with a public interest." That interest arose through the right of the state to insure that the utility comply with the duties arising from its profession of public service,—the duties to serve all of the public without discrimination with reasonable service and at reasonable rates. But subject to these duties affecting the conduct of its business the property was private property. Since public utility rate regulation began, the courts have always so held, in cases where the issue has arisen from various angles. The principle was clearly recognized in the case of *Munn* v. *Illinois*, 94 U. S. 113, 126. In the *Minnesota Rate Cases*, (230 U. S. 352), a serious and careful effort was made to secure the adoption of a contrary doctrine. It was suggested that the carrier performs a function of the state, and that its roadway is public and like a public highway. Original cost was therefore urged as a substitute for value. But the United States Supreme Court repudiated the contention. It said:

> Here we have a general schedule of rates involving the profitableness of the intrastate operations of the carrier taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws.
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> The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the service given to the public.
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> The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.

With the rights of the owners in private property clearly recognized, the early decisions in which the valuation doctrine found first expression in cases involv-

*Address delivered at the annual meeting of the Public Utility Section of the American Bar Association at Minneapolis, Minn., on August 28, 1923.

ing rate regulation, were concerned with the constitutional protection of that property. Where private property was condemned and taken as an entirety, it was already established that the Constitution required that its value be paid in compensation to its owners. By analogy, express or implied, it was held that where the issue was whether such property was taken by an act prescribing rates unduly low, the test under the Fourteenth Amendment, as in condemnation cases, was whether the utility was deprived of the value of the property. The development of the doctrine in rate regulation cases was a natural step from its expression in condemnation cases. It found early expression in the case of *Reagan* v. *Farmers' Loan & Trust Company,* 154 U. S. 362, 410, and in the decision of Justice Brewer in *Ames* v. *Union Pacific,* 64 Fed. 165. It found complete expression when the later case came before the Supreme Court in the case of *Smyth* v. *Ames,* 169 U. S. 466, 535, where the Court held that the basis of regulation must be the fair value of the property used in public service, and said:

> In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.

The Smyth-Ames decision was rendered in 1898. Its doctrine has been frequently reiterated by the United States Supreme Court without amendment. The first railroad cases in the Supreme Court subsequent to 1898 were the *Minnesota Rate Cases* (230 U. S. 352), decided in 1913. The doctrine was there reiterated and explained. From the language in these various decisions and considering the circumstances under which the doctrine developed, it is clear, I believe, that the Court held and intended to hold, that since private property was to be protected in cases of rate regulation by insuring a protection of its value, as in a case of condemnation, that value, as in a condemnation case, was its economic equivalent, that is, what it was worth, its true value in the economic sense, the price at which it would exchange between a willing buyer and seller. As the measure of the *property,* which could not be taken from the owner, there was prescribed its economic equivalent as of the time of the attempted taking, so that the owner might be kept whole, as in a condemnation case. That value was necessarily a question of fact. It was to be determined as a question of fact, on the basis of a consideration of all of the relevant facts. In the *Minnesota Rate Cases,* the Court declared that each case must rest upon its special facts, the issue being the reasonable value of the property at the time it is being used for the public. The Court said:

> The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. . . .
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> It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.

This language means that the value is not to be determined by the adoption of a mere cost figure or an arbitrary cost rate base, not calculated to reflect, and irrespective of, the peculiar worth of the property and, therefore, not its true economic equivalent. The judgment is to be a conclusion of fact as to the true value of the property, such as a jury is required to make in determining just compensation where land is condemned. The conclusion is to be derived by the same processes. The theory contemplates that the determination of value is to be under the same principles in different kinds of cases where value is determined for different purposes.

That a cost figure not reflective of the true present value of the property was meant by the Court is positively disproved by the circumstances in the Smyth-Ames case, and in the subsequent cases. The case of *Smyth* v. *Ames* was tried in an era of falling prices. The carrier contended that it should have a return sufficient to pay its operating expenses, fixed charges and dividends, these to be based on an investment made in a time of higher prices. On the other hand, the carrier's opponents, who were led by Mr. Wm. J. Bryan, as counsel for the State of Nebraska, contended that the test should be the value of the property measured by the cost of reproduction. But both the lower court and the Supreme Court held that the *value* of the property should be the test. The Supreme Court has had frequent occasion to affirm the rule when again it has been urged that a cost should be used as a substitute for value. In the case of *San Diego Land and Township Co.* v. *National City,* 174 U. S. 749, the utility contended that the basis should be the cost of the plant and a return "by way of interest on the money it has expended for the public use." Justice Harlan in his opinion however said: "The basis of calculation suggested by the appellant is, however, defective in not requiring the *real value* of the property. . . ." (page 757). In the case of *Wilcox* v. *Consolidated Gas Company,* 212 U. S. 19, it was contended that the original cost should be taken as the measure of the value of certain lands, and again the court adhered to the value rule. In the case of *San Joaquin Company* v. *Stanislaus County,* 233 U. S. 454, it was contended that where water rights were appropriated for the public use of irrigation by a water company there should be no return on their value. The lower court so held. The United States Supreme Court reversed the case on that ground.

The matter received most careful attention in the *Minnesota Rate Cases.* In that case the Attorney General of the State of Minnesota presented the matter at length and insisted that the valuation should be determined upon the basis of the *bona fide* investment. It was contended that a railroad property is not like ordinary private property, that the railroad performs a function of the state, that the creation of highways is a function of the state and that a railroad is a public highway. It was argued that the railroads had received as donations from the public certain lands, and that in any controversy between the railroads and the public as to reasonable rates, these items should be excluded from consideration. (See the brief of the State of Minnesota filed by its attorney general, pp. 33-79.) The United States Supreme Court answered these contentions.

The Court stated, in language which has already been quoted, that "the basis of calculation is a fair

value of the property used for the convenience of the public," that the carrier could not be limited to the amount of the actual investment, nor could it be protected in its actual investment if that investment were too high, and that the property being held in private ownership, its value and not its cost, was the controlling consideration. The natural measure of the property was its economic equivalent, its value. The measure of cost was rejected because it is a matter of every-day experience that there is frequently no close relationship between the value of property and the amount invested in it, or its present or original cost. The basis of most of the transactions in the business world is the margin between value and cost, or the margin between values as of different times. The theory of the Court was that the question of what the property was really worth, therefore, should be determined as that question commonly is determined. It was a natural and apparently simple doctrine. It undoubtedly assumed that the determination of value was a more simple matter than it has actually proved to be, for some kinds of property at least, and could be made with definiteness. In the means of determination in the application of the theory has arisen difficulty which has been a cause of confusion as to the theory itself.

Since the establishment of the valuation doctrine, there has been an evolution of thought concerning the nature and determination of value, working its way slowly through the decisions of the courts and commissions. Few cases have arisen concerning railroad property. The cases have been usually concerned with the property of municipal utilities such as water and light companies. They generally present a problem different, from an economic standpoint, from the problem presented by a railroad. The gas plant usually is a monopoly. The railroad ordinarily is operating in a competitive field. The gas plant consists of a physical plant, largely the result of human construction, which is directly reflected in cost. But a railroad, on the other hand, is characterized by a relatively greater number of qualities inherent in such things as location (topographical location and location in relation to trade routes and trade centers), gradients, curvature, and other such factors, which factors are quite independent of cost. The rates of a gas or water company are not competitive. They are fixed for the monopoly itself. But all the railroads in a rate territory ordinarily compete under a general or common rate schedule, under conditions where there is a relatively free play of the forces of competition. Thus the two problems from an economic viewpoint ordinarily are quite different. The difference is perhaps one of degree rather than of kind. It does not exist as to all properties. Some railroads are largely monopolistic, while some gas or electric plants are strongly influenced by competition. But such cases are the exception to the general rule. We are discussing here the normal cases.

In the ordinary case of a water or a light utility, it has not been unreasonable to use as the measure of the value—(the kind of value set up as a standard by the Smyth-Ames case—the economic equivalent), the cost of the original or of a present-day construction of the property. The element of competition is ordinarily so slight and the qualities of the property not reflected in cost are so few, that the cost of the property may properly be a predominating consideration in determining its value. And, in fact, in the great majority of cases the cost method has been employed, with individual variations as to detail not important for our present consideration. The value thus determined is usually not widely divergent from the original cost. In a large percentage of transactions in the business world, the value of property is measured by what is paid to produce it, and while that price is admittedly no criterion where the thing acquired is not necessary or suitable for its purpose, or where it does not economically or satisfactorily function in its intended use, yet where it is properly adapted to its purpose, we ordinarily have no hesitation in accepting cost as a controlling evidence of value. The cost of production or construction with an adjustment for depreciation, in the absence of other controlling circumstances, is ordinarily accepted as the *prima facie* value of such property as buildings, ships, wharves, machinery, and a great variety of properties and products.

It is not intended to suggest, that in the cases involving these monopoly properties, the view was uniformly held by the courts and commissions that such cost actually measured the *economic* value of the property. There had developed a school of thought which held that true value ought not to be used at all, and many of these cases are decided on that theory. But because of the nature of the economic problem presented by the monopoly, the cost method, on whatever basis justified, was not inconsistent, in the majority of cases, with the results intended to be derived by the Smyth-Ames doctrine.

When the Interstate Commerce Commission came to determine the principles under which it would ascertain the value of railroad property under the federal valuation act passed in 1913, there was presented to it for consideration a wide variety of views reflecting divergent interpretations of the doctrine of *Smyth* v. *Ames*. The issue between cost as a basis, and the value as a basis, was clearly drawn.

Before reviewing those views, let us examine further the nature of the ordinary railroad, having in mind the valuation problem which it presents. As I have suggested, it usually is totally unlike a water or light monopoly. It operates in a competitive field under a reasonable rate schedule fixed for all of the roads in that territory. It is an axiom of economics that where competitive forces act freely, value is the result of the forces of supply and demand. The true value of such a railroad depends primarily upon the demand for its transportation service, the extent to which in competition with its rivals it can supply that service, and the economy with which it can do it.

In any rate territory, as has been frequently stated by the Interstate Commerce Commission in its decision of rate cases, rates cannot be based upon the value of each particular road allowing to it only a fair return upon that value. The rates charged by different railroads in given railroad territories are the same, or they have a definite relation to each other, irrespective of the cost of the property of any particular carrier and irrespective of the ratio which net earnings under such rates bear to the cost of any particular carrier's property. Thus in numerous cases it has been held that the fact that a rate schedule permits a large return to certain of the roads, and a scant return to others, does not prove that the schedule is improper. It has been held also that the same rates must be fixed for the entire territory. Under a schedule of rates thus fixed, it will always occur that certain roads, primarily because of their location, will be able to handle more traffic and at a greater profit than others, and there

will inevitably emerge certain differentials of value because of the possession by certain roads of certain qualities and potentialities which are the very crux of the question of their economic value. These differentials will be indicated by differences in earnings, which are the evidences of the existence of certain elements of value. The earnings themselves are not the cause, but the effect, of value arising from qualities inherent in the property. These are qualities resulting largely from location. They exist because of factors dependent on location such as the density of population, the number and diversity of industries, the productivity of the territory served, the relationship of the carrier's line to centers of population and industry, and the location of the carrier's terminals in cities. Factors of that sort affect the demand for the carrier's facilities and the economy and efficiency with which the demand can be served. Certain of the factors of location are reflected in the degree of the efficiency and economy of operation, such as the relative directness of the carrier's route, the gradients, the amount of curvature, and a great variety of physical conditions and qualities arising from the nature of the country traversed, and its topographic, climatic, and other conditions. These qualities and factors are numerous and complex. None of them is directly reflected in construction cost. They determine the relative earnings of the various roads. As the result of the varying degree in which they exist in the various roads in any group, the roads find their respective places in a scale of earning capacity. The roads ordinarily will hold those respective places in that scale, whether the general rate level of the group goes up or down. These differentials arising from location are qualities of the property. It is important to notice that they are in nature substantially like the qualities of town lots or farm acreages, decisive of their value, and comprised by the title to such private property. They are not comprised by the orthodox conceptions of "going value," or "cost of development," as those elements have been defined by courts and commissions. Nor are they of the nature of the so-called "intangible values." They are no more intangible than the value attaching to a town lot because of its location. These elements of value are not "other values and elements of value," in addition to, and differing from, any so-called "structural value" of the carrier's structural property. The value of a railroad cannot be thus dissected. The value of the structural property depends primarily upon these differential elements.

Under these circumstances, although the approach to value in the case of a monopoly may properly be through the avenue of the sacrifice by which its property is secured, the approach in the case of a railroad, largely because of the competitive conditions and these differentials arising from location and not reflected in cost, must be through a consideration of the economic utility of the property secured by the sacrifice, rather than by a consideration of the sacrifice. The value of individual railroads we know has not been necessarily proportionate to the investment in the property. Instances will occur to the mind of anyone. The first road built in the country follows the floor of the canyon, the most advantageous route. The second is higher on the canyon slopes, and requires more grading and tunnels. The former follows a water grade. The latter goes through the mountains with expensive construction. Costs are not directly reflective of the utility or worth of these two lines. A railroad obviously may be worth more or less than its original or reproduction cost. Railroad investors have so discovered to their profit and to their loss.

It is safe to say that all of the divers views that had ever been developed in the field of physical valuation, were suggested to the Interstate Commerce Commission when it came to define its theory of value. Throughout these views, however, there was a distinct cleavage between two schools of thought. The view was urged, which I have suggested was the position intended by the Court in the Smyth-Ames case, that value is to be determined as the true economic value of the property, as a question of fact upon the basis of a consideration of all relevant facts. Under this theory, the value is to be determined under the same principles in all cases. The inherent qualities of the property are to be considered, and private property is to be protected. The carriers generally urged that position.

But all participants, other than the carriers, accepted no such doctrine. It was urged that in a case involving rates, the word "value" cannot be taken in its economic sense, that the productivity of the railroads, and in effect the differentials due to relative degrees of efficiency in location, construction and operation, cannot be considered. The reason stated was that these qualities are reflected or evidenced in earnings, whereas the value determined for testing rates is for the purpose of determining what earnings ought to be. The qualities of the property are to be disregarded because one of the evidences of them is one of the objects of the inquiry. This reasoning admittedly leads to the entire repudiation of the economic conception of the value of property—its economic equivalent. Director Prouty, of the Bureau of Valuation, whose thought has had a great influence in molding the work of the government, stated that value is not an economic thing. It is an equitable concept—a thing commending itself to the mind of "what is fair." It is an indefinite concept. He said that it is, in fact, not susceptible of "definition," but can merely be "described." The proponents of this theory did not urge that the "value" to be found on this basis is a mere legislative rate base determined independently of judicial standards. The authorities cited were cases in the various courts in which the issue has been the judicial issue of confiscation. It was to be determined as the value of the property, as defined in such cases as *Smyth* v. *Ames* and the *Minnesota Rate Cases*. All parties appearing, other than the carriers, adopted this position that real value should not be ascertained—the individual states, the national association of state commissioners, the railroad brotherhoods, and the Commission's Bureau of Valuation. They varied somewhat as to "what is fair," but all agreed that the "value" found was to be a cost figure.

The Commission, when it came to decide the question, apparently adopted the theory just discussed. The Bureau of Valuation, in fact, makes no careful investigation of the inherent qualities of a railroad from the standpoint of the economic value of its property. Its investigation, so far as data usable in determining value is concerned, is largely restricted to engineers' investigations of reproduction cost, accountants' statements of investment and income accounts, and land appraisers' estimates of land values (based on the value of the land for other than railroad purposes). Up to the present time, the Commission has not

rendered decisions explaining its action.[1] It has issued three hundred and twenty-nine tentative valuations in which there is a finding of "final value" designated as "for purposes under the Act to Regulate Commerce," this being obviously intended not as a determination of real value, but a determination of a rate base on a basis of cost. The aggregate value found for such properties was $2,898,000,000. An analysis of the figures shows that a cost formula has been generally employed, although the same formula has not been applied in every case. In a very large number of cases, and in so so great a number that obviously it is not by mere coincidence, it occurs that the addition of the cost of reproduction less depreciation, and the acreage value for non-railway purposes of the land, together with a sum which is 5 per cent of the preceding two amounts, will produce a figure, to which the "final value" (reported in *round* figures) is very close. Taking the 329 tentative valuations as a whole, the final value found is 5.6 per cent in excess of the aggregate cost of reproduction less depreciation and land value figures. Speaking generally, a cost method has been used for all railroads with no regard for their relative productivity, or the existence or non-existence of the qualities which determine value in any true sense. Where there has been any variation from the rule of adding 5 per cent, it does not appear that it has been because of any effort to ascertain the true economic value of the property.

These results seem to come from an application of doctrines thought to be declared in the confiscation cases. The use of the cost of reproduction less depreciation is based on the language appearing in various confiscation cases. The determination of the land "value" is based on certain language in the opinion of the *Minnesota Rate Cases*, which was critical of the testimony there introduced with reference to the value of the lands, which was a plain issue of fact and so designated by the Court. This language has, however, been elevated into a pronouncement of constitutional law that, although the value of the property is to be determined upon a basis of a "consideration of all relevant facts," to use the language of that very decision, yet the value is to be restricted to the acreage value of the adjoining lands, without consideration of the present-day cost of acquiring the carrier lands, which cost obviously *is* "a relevant fact" in determining their value. The 5 per cent apparently is added to cover other elements of value, such as going value and appreciation. This is, however, surmise. No analysis of methods is furnished in the tentative valuations in explanation of the results derived, although obviously such analysis could be given if the Commission desired. There are abundant precedents for the results in the various state commission decisions which, however, were rendered not in railroad, but in municipal utility cases. The value of a railroad has been determined as though a railroad were like a monopolistic utility. It seems that the coat has been put on the shoulders of the man for whom it was not made.

The figures thus derived assume great importance because of the recapture provisions of the Transportation Act of 1920. Section 15a, provides that the commission in the exercise of its power to prescribe just and reasonable rates shall initiate rates which, as a whole in each of such rate groups as the Commission may designate, will earn an aggregate return equal to a fair return upon the aggregate value of the property in such group. It is provided that the value determined under the Valuation Act, and in the investigations here described, shall be used for the purposes of determining such aggregate value. A most important provision is that if any carrier shall receive in any year an income in excess of six per cent of the value of the railroad property, one-half of such excess shall be placed by the carrier in a reserve fund and the remaining one-half shall be paid to the commission for the purpose of maintaining a general railroad contingent fund. The value of the property for the purpose of calculating such excess, is to be the value determined in the federal valuation proceedings. (These provisions are found in section 422 of the Transportation Act, 41 Stat. at L. 456, 488, this being an amendment of the Interstate Commerce Act by inserting after Section 15 a new section to be known as Section 15A.)

What is the effect of this recapture of earnings, where the "value for rate making purposes" upon which the reasonableness of the earnings is determined, has been fixed on a cost basis such as the commission uses, or on any other cost basis such as a prudent investment? Our minds reason best in a consideration of concrete cases. The following examples serve to illustrate several phases of the situation. It may well be borne in mind in considering these cases, that it is, of course, not material in discussing the recapture from a constitutional standpoint, that it requires the taking of only half of the earnings in excess of the designated return. If half can be taken, all can be taken.

Case 1. Two men purchase business lots for the same price on different streets of the same city. Business development greatly increases the utility of one of these lots and its economic value, but not of the other. That increase belongs to the owner. It is clear that any statute which, on the basis of the original investment in the two pieces of property, would deprive the owner of the better lot of the increased revenue due to its superior location, thereby virtually making it equivalent in value to the poorer lot, would destroy that differential increment in value due to the advantage of location. Such an appropriation would violate established conceptions of rights in private property. This is merely an illustration of the so-called "unearned increment."

Case 2. Assume the ordinary case of a competitive railroad operating under a schedule of rates fixed for all the roads in its territory or group, on the basis of a cost valuation of the railroad property in the group, as fixed by the Interstate Commerce Commission under the Transportation Act. The particular railroad in question, because of physical and other qualities of its property due to its location (as, for example, its superior route secured in early days by which it avoids grades and tunnels, its location with reference to centers of population, and trade routes, and its efficiencies in construction and operation), develops a superior degree of usefulness and economy. These qualities are incidents of the rights in private property. They are independent of cost. They can

1. This address was delivered on August 28, 1923. On September 11, 1923, the Commission issued decisions in the case of the San Pedro, Los Angeles & Salt Lake Railroad Company, Docket No. 96 (75 I. C. C. 463), and in the case of the Atlanta, Birmingham & Atlantic Railroad Company (75 I. C. C. 645), Docket No. 4. In the opinions of the majority of the Commissioners, as well as in the several concurring and dissenting opinions, there is a thorough discussion of the questions involved. It appears from these decisions that the "value for rate making purpose" which is reported, is not the true value or the economic worth of the property. It is a finding of a "just amount" determined largely "by equitable considerations" upon which it is "just and right" that the carrier if possible, be permitted to earn a return (San Pedro decision, pages 504-14, 529, 538, 551-4, 567-9, 576-589; Atlanta decision, pages 672-6). The value found is a cost figure. The Commission repudiates the theory that the true value of the property is pertinent where the issue involved is that of value for rate purposes. The rate base reported is not "defined." It is "described" with entire indefiniteness.

no more be measured in terms of cost than the difference between the two business lots mentioned in Case 1. This road may earn 12 per cent on its prudent investment, or on a so-called "value" determined on a cost basis such as the Commission has employed, leaving 6 per cent subject to recapture and restraint. A determination of such a value on a basis of cost, which is not value at all, and not the property's economic equivalent, but determined without a consideration of these qualities, necessarily effects a deprivation of them, if the recapture is employed. These two cases illustrate clearly, that increments in value in railroad property, of a character exactly similar to increments in value in other private property, are destroyed, and such elements of advantage as arise from location are confiscated, if a value is found on a basis which is other than that suggested by a proper interpretation of the case of *Smyth* v. *Ames*. The problems illustrated by these two cases are on an exact parity from the standpoint of economics. The problem in the case of the railroad is merely the old problem of the so-called "unearned increment" in land. It is disguised here in a new form.

Case 3. A railroad operates in the southwestern deserts where there is great difficulty in obtaining engine water. The road is earning about six per cent upon a so-called "value" ascertained on a cost basis. It then succeeds in perfecting its claim to a water right, which it acquires for $100,000, that being its value for non-railroad uses. The possession and use of this water right enables annual savings which capitalized produce a figure of $10,000,000. The "value" found on the cost basis will be increased only $100,000. Thus the very great part of the value produced by the ownership of this water right is subject to recapture or restraint. The water right is private property. If on the other hand, in a desert area, one rancher appropriates a water right and thereby makes his desert ranch "blossom as a rose," while his neighbor is not successful in his appropriation of water, we would hesitate to attempt through any legal process to limit the earnings of the two owners to the original investment in the desert land, without consideration of the value of the water right secured by appropriation and substantially without cost.

These examples show the nature of the problem when it is reduced to its lowest terms and to terms common in the treatment of ordinary private property. From an economic standpoint, the problems of the railroad, the two business sites in the city, and the desert ranches, are essentially one problem. We would not sanction an appropriation without compensation of the increment in value of the city building sites, or of the desert ranch. But as to railroad property, such an appropriation is said to be authorized by the statute. That statute contemplates the use of the "value" determined by the commission. It has now ascertained a "value" on a cost basis, regardless of value differentials not expressed in cost.

The following conclusions can be drawn under these circumstances:

1. If the value protected by the Constitution is not value in an economic sense (that is the economic equivalent of the property, reflecting its peculiar conditions and qualities arising from its location), a recapture of earnings under the provisions of the Transportation Act constitutes a confiscation of the property. The superior location is taken away. The recapture is an appropriation of the property rights in the physical property—arising from its location and attributes, and is an appropriation on an exact parity with the taking of the so-called "unearned increment" in the city lot, or the water right on the desert ranch, due to the location and attributes of that property. A cost figure cannot reflect such attributes. A cost figure, therefore, does not reflect the *property*. Yet in the *Minnesota Rate Cases*, the Court said: "The property is held in private ownership and it is that property and not the original cost of it which the owner may not be deprived of without due process of law." The reasoning of this statement applies not only to original cost, but to any cost, and with equal force.

2. On the other hand, if value is determined as the Court contemplated in *Smyth* v. *Ames*, and as a jury would determine it in a condemnation case (considering "all the relevant facts" as required by the *Minnesota Rate Cases* decision, including all the attributes and qualities of the property), whether there will be any taking of the property through the operation of the recapture provision will depend as a practical matter on the judgment of the commission, court, or jury in fixing the value. Ordinarily it is clear that the earnings subject to recapture in cases of prosperous railroads will be less than if an arbitrary cost figure is determined as the value. Theoretically, the amount subject to recapture will be nothing, and the recapture will be defeated.

3. As has been suggested, the controlling criterion here is whether these attributes of railroad property consisting of these differential elements as between various competing railroads, are such elements of private property that they are to be protected. The fact that a railroad is "affected with a public interest" has up to this time justified its regulation in order to insure the performance of its public duties, but it has not yet been held that railroad property is so out of the category of private property as to justify the appropriation without compensation of those increments of value due to these differentials, which increments could probably not be taken from the owner of the business lots of a city or the ranch owner on the plains, without an overturning of the very government itself. If a theory of value is adopted, under which it is unnecessary to respect the differentials between individual carriers, but under which "value" is to be fixed on an arbitrary cost basis for railroads, regardless of how conceived, located or operated, a destruction of the rights in private property, like the confiscation of the "unearned increment," is accomplished when the Supreme Court approves that theory of value.

When we consider what the owners of the railroad property would be entitled to, were the property condemned, or were we to purchase it as an investment, all agree that the cost of the property, not reflecting these differentials, should not be used as a criterion. If used, we would agree that the constitutional safeguard had not been afforded. But in a case where the fixing of rates is the issue involving the value of the identical property under consideration in the condemnation case, it is urged that since the important attributes of the property are reflected in earnings, they cannot be considered in determining the value, because the reasonableness of those earnings is one of the objects of the inquiry. In the case of a monopoly, it is difficult to escape the logic of that proposition. The value for rate making purposes of a monopoly cannot be determined upon the basis of a consideration of its productivity under rates fixed for the monopoly. There are no such differentials in the case of a monopoly. But in a case of competitive property, the use of cost

as a measure of value is impossible, because all these decisive factors or elements of the property are not reflected in cost. Only if the true value of the property is determined, as the Smyth-Ames decision intended it to be determined, and as a jury would determine it in a condemnation case, will there be a protection of the property itself. Those who urge the cost theories of "value" argue under these circumstances that the formation of such a judgment is not practicable, because it involves the determination of what the economists term "intrinsic value." It is said that earnings necessarily have to be considered and that this involves circuitous reasoning. It is, therefore, urged that the value to be determined cannot properly be a true value. A cost is to be substituted. This means that private property and its attributes and elements are not to be protected.

Under these circumstances there are two possible courses which might be pursued. The rights in private property may be recognized or they may be abrogated. They may be protected by insuring the formation of a judgment by the tribunal as to the true value, as *Smyth* v. *Ames* contemplated, which will fully protect the differential qualities of the property. If such a judgment is thought not practically possible, as the critics of *Smyth* v. *Ames* assert, and if the cost method of determination is the only feasible method, then rates should be *made* as a legislative matter upon a basis of cost. But under such a system, the earnings due to qualities inherent in the physical property and not reflected in such cost, should not be subject to recapture, for the use of recapture under such circumstances constitutes a clear confiscation of the differential elements of the property. The two courses just outlined assume that the property of railroads is private property and that it and its attributes are to be protected, either in one way or another. In the event that neither of those courses is adopted, the course which remains is to regard such property as not in the category of private property, to regard its earnings subject to recapture, and not to protect the differential elements of the various railroads. This is what the proponents of the cost theories urge. If this course is taken, the value of railroad property is no longer of any significance. Important rights of private property in railroad holdings are practically destroyed. It will then become the duty of the courts to establish a new constitutional doctrine on a radically different basis than heretofore recognized, and which will insure the constitutional safeguards not for property, but for investments in a property so "affected with a public interest" that it is no longer private property and is, therefore, subject to regulation on the basis of an equitable treatment of an investment made in a thing substantially divested of elements of private ownership. That this be done has been frequently urged. In what is in effect a dissenting opinion by Judge Brandeis in the recent case of *State of Missouri* v. *Southwestern Bell Telephone Company*, decided May 31, 1923, this proposition was suggested in the language, "The thing devoted by the investor to public use is not specific property, tangible and intangible, but capital embarked in the enterprise." Such a theory strikes at the very root of the institution of private property. Its exact opposite was stated in the decision in the *Minnesota Rate Cases:* "That property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

(*Concluded in December issue*)

CURRENT LEGISLATION

A PHASE OF THE CONTRACT CLAUSE; CLAIMS AGAINST THE GOVERNMENT

By J. P. CHAMBERLAIN

A VERY interesting attempt has been made by Congress to extend the jurisdiction of the Supreme Court in cases involving the obligation of contracts. Under the decisions, where the highest court of a state has upheld the validity of a state statute and subsequently a case arises in which the court overrules its earlier decision, it is well settled that the party to the suit who has entered into a contract in reliance upon the validity of the statute as construed by the earlier decision, cannot claim that the obligation of his contract has been impaired by the later decision, within the meaning of Section 10 of article 1 of the Constitution, forbidding the state to pass laws impairing the obligation of contracts[1], although an early case seems to hold the contrary.[2]

It is equally well settled that if the case goes to the Supreme Court of the United States from a state court, the Supreme Court is bound by the decision of the state court and will not determine for itself the proper construction of the state constitution and statutes determining the validity of the contract.[3]

"Other principles obtain when the writ of error is to a Federal Court."[4] Here the Supreme Court is not bound to apply the latest ruling of the State Court. "They may, in suits within their jurisdiction, properly hold,[5] that the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court of the state at the time such rights accrued. The statutory provision that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply has not been construed as absolutely requiring conformity, in such cases, to decisions of

1. Cleveland, etc., R. R. vs. Cleveland, 235 U. S. 50.
2. Gelpke vs. Dubuque 1 Wall 175.
3. Central Land Company vs. Laindley, 160 U. S. 103; Turner vs. Wilkes County, 173 U. S. 461.
4. Turner vs. Wilkes County.
5. Loeb vs. Trustees 179 U. S. 281, 5 Fed. Stats. Ann. 1139.

the state courts rendered after the rights of parties have accrued under the previous decisions of those courts of a contrary character."[6]

It is also the rule that where a case involving state law has been decided in a federal court before the State Supreme Court finally passed on the rule of law involved, and the State Court has subsequently adopted a rule contrary to the decision in the lower federal court, the United States Supreme Court is not bound by the later state decision, on an appeal from the prior decision in the federal court. Therefore a different rule may be applied in respect to the validity of a contract, depending on whether the case is brought in a state or federal tribunal.[7]

Congress has declared its will that the Supreme Court have the same discretion in respect to suits appealed from a state court as it now exercises on appeals from federal courts in Public Act 144, 42, Stats, 366. The new Act is an addition to section 237 of the Judicial Code, on writs of error from judgments or decrees of state courts. It provides that in any suit involving the validity of a contract where it is claimed that a change in the rule of law or construction of a statute by the highest court of the state would be repugnant to the Constitution of the United States, the Supreme Court shall upon writ of error re-examine, reverse, or affirm the final judgment of the state court, if such claim is made in the state court at any time before final judgment is entered, and if the decision is against the claimant.

If in a case coming to the Supreme Court under this statute, the court applies its doctrine that a change in the jurisprudence of a state court is not the passing of a law impairing the obligation of a contract, it is hard to see just what federal question could be involved in respect to the contract clause of the Constitution. If such a decision is not "law" in the sense of Section 10 of Article 1, then Congress cannot make it so by fiat, but the deliberate interpretation by Congress of the Constitution will have weight, undoubtedly, with the Court.

A considerable number of the bills introduced into Congress are private claim bills, often claims for comparatively small sums. These bills take up time of Congressional committees, and of Congress itself, besides making a call on the hours and energy of members in looking after the claims of their constitutents. To lessen the flood of such bills and to relate the procedure in claim matters, Congress has from time to time, provided methods for suing the Government, but no general statute covering claims founded on tort has even been enacted, though a few of the executive departments have been authorized in a very limited way to settle minor claims. The result is that persons having claims for injury and damage caused by the negligence of Government employees, have been obliged to resort to the method of seeking the passage of a private bill through Congress. The Committee on Claims of the House of Representatives states that nearly one-third of the bills filed with that committee are for amounts less than $1000, and the majority of these are claims for damages arising from accidents involving Government owned automobile trucks.

In 42 Stats. L. 1066, Public 375 authority is given to the head of each Government department to adjust and determine any claims accruing after April 6, 1917 on account of damages to or loss of privately owned property, where the amount of the claim does not exceed $1000, caused by the negligence of any officer or employee of the Government acting while within the scope of his employment. Amounts found due are to be certified to Congress as legal claims for payment out of appropriations made therefore. No claim is to be considered unless presented within one year from the date of its accrual.

42 Stats, L. 1006, Public 374 authorizes the Secretary of the Navy to adjust and determine claims not exceeding $3000 for damages caused since April 6, 1917 by collisions or damage incident to the operation of vessels, if naval vessels of the United States are at fault, and report the amounts to Congress for payment out of appropriations. The previous law limited the amount of claims to be settled by the Secretary of the Navy to $500.

These hesitating steps show very clearly one way in which the flood of bills may be decreased, better methods of administration secured and expense and time saved to citizens doing business with the Government.

6. Burgess vs. Seligman, 107 U. S. 20, 5 Fed. Stats. Ann. 1138.
7 Gelpke vs. Dubuque. 17 Law Ed. Notes, p. 803.

An Occasion of Abiding Interest

"Close upon the delivery of Lord Birkenhead's address to the American Bar Association, in which he again emphasized the binding influence of the 'majestic principles of the Common Law' on both sides of the Atlantic, comes the official announcement that the American Bar Association have unanimously decided to accept the invitation of the Law Officers, the Bar Council, and the Law Society to hold their annual meeting in this country next year. Many famous English lawyers have been the honored guests of the American Bar Association. The late Lord Coleridge and Lord Russell of Killowen, a generation or more ago, and Lord Haldane, Lord Shaw, Lord Cave, and Sir John Simon, as well as Lord Birkenhead, in more recent years, have addressed the members of the American Bar Association at their annual congress. The meeting of the Association in London next July will afford a welcome opportunity to all English lawyers of strengthening the good relations with their American brethren which these notable visits have helped to bring about. Hardly less interesting is the announcement that the Canadian Law Association—who also have listened to many a memorable address by an English lawyer—have expressed their intention to visit this country at the same time as the American Bar Association and to act as joint hosts. It will be an occasion of great and abiding interest, unique in the long annals of the legal profession, and showing more clearly than ever before how strong a link is the Common Law among all English-speaking peoples."—*The Law Journal, Sept. 15.*

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar, the editors assume no responsibility for the opinions in signed articles, except to the extent of expressing the view that the subject treated is one which merits attention.

THE "NEW FEDERALIST SERIES"

Hon. John H. Clarke, Formerly Associate Justice of the United States Supreme Court, Writes of "Judicial Power to Declare Legislation Unconstitutional"—Eighth Article of Series Published and Distributed Under Auspices of Citizenship Committee of American Bar Association

In the task of helping to explain and sustain American institutions by promoting a clear understanding of the reasons for them, the American Bar has an important part to play. Conscious of the need and the responsibility, the AMERICAN BAR ASSOCIATION JOURNAL has undertaken the program of printing a series of brief articles, beginning with the March issue, on American principles of government, under the title of "The New Federalist." There is not a particle of political significance in the title chosen. The historical political significance definitely attached to the name "Federalist" came after the publication of that remarkable series of Federalist Papers, in which Hamilton and Madison and Jay engaged in the task of enlisting the support and reaching the mind and heart of people in behalf of the Constitution under which we have lived and prospered so long.

These articles will not be addressed to the legal profession, which will find the justification of such contributions in the character of the work done and the importance of the proposed public service, but to those who need the information. They will be clearly written, reasoned and not declamatory, adapted to the fair intelligence of both native and foreign-born citizens, and will make a special effort to counteract current misconceptions on fundamental points.—(From announcement of the New Federalist series in the Journal, February, 1923.)

ABOUT once in a generation, it becomes necessary to restate the authority upon which the Supreme and other courts of the United States assume the power to declare acts of Congress and of state legislatures unconstitutional and void, because about once in that time the Supreme Court renders a decision, or a series of decisions, of such general effect that public men or interests are moved to assail the validity of the power and to seek to take it away from the courts or to greatly modify it.

Many persons unacquainted with its history imagine that just now there is wider criticism of, and discontent with, the Supreme Court than ever before. It is believed that this is so far from being true that it is safe to say that the court is now much more strongly entrenched in the confidence of the people than is any other department of our Government. His proposal for recall of judicial decisions cost Theodore Roosevelt, with all of his great personal and political prestige, the presidential nomination, certainly, and perhaps the election, in 1912. Men and newspapers disposed to capitalize discontent with the court should make note of this.

This power in courts to declare acts of the highest law making body of the government null and void was originally so unique that it has been called: "A novelty in the history of nations;" "The peculiar glory of the American people," and "The one original contribution of America to the science of government." I am quite aware of the results of the intensive studies made to discover a similar jurisdiction in ancient and modern Europe, but full acknowledgment of the value and scope of such results does not impair the descriptive accuracy of these expressions.

It is said that an English lawyer, having heard the power of our courts to declare acts of Congress invalid, greatly extolled, studied the United States Constitution critically for two days, seeking in vain for the grant of that power to the courts. The story may well be true, for while there is clearly enough a textual grant of such power in the Constitution over state constitutions and laws (Art. VI, par. 2), there is no such grant in terms—in sentence or clause—over acts of Congress to be found therein.

The origin of the power was first authoritatively stated in the opinion of the Supreme Court in Marbury vs. Madison[1] rendered in 1803.

The process of reasoning by which Chief Justice Marshall convincingly derived this power is substantially as follows:

The people of the United States, as the original and supreme source of power, organized our Government, assigned to different departments their respective powers, and established certain limits "not to be transcended by those departments." In order that the powers so defined and limited may not be mistaken or forgotten, our Constitution was committed to writing. If now the limitations thus placed by the written Constitution upon Congress may at any time be exceeded by it, then acts prohibited and acts allowed would be of equal obligation (as laws), and therefore it is too plain to be contested that it was intended that the Constitution, created or enacted by all the people, should be superior to any act of Congress which could be enacted by mere agents (representatives) of the people, having strictly limited powers. Said the court:

> "Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts (of Congress) and, like other acts, is alterable when the legislature shall please to alter it.
>
> "If the former part of the alternative be true, then a legislative (Congressional) act contrary to the Constitution is not law; if the latter be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.
>
> "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory

1. 1 Cranch 137.

of every such government must be that an act of the legislature repugnant to the constitution is void.

"This theory is essentially attached to a written constitution and is consequently to be considered by this court as one of the fundamental pronciples of our society."

In this manner, the Supreme Court, with unassailable reasoning, reached the conclusion that the essential nature of our government renders the written Constitution of the United States the law of supreme obligation in our country, to which all enactments by Congress or in state constitutions or by state legislatures must yield, when they come in conflict with it. It is the supreme law of the land and all other enactments, to the extent that they conflict with it, are necessarily void.

But the determination of the supreme character of the Constitution, as law, still left open the question as to what authority, under our system of government, is competent to decide as to when such conflict between the Constitution and inferior enactments exists as to render the latter void,—May Congress for itself by enacting a law make final decision of this question of constitutionality, as the British Parliament does, or may the courts by deciding that it exists, render an act of Congress void?

The Supreme Court saw clearly that this question must be met and in this same case of Marbury vs. Madison went forward and determined it, saying:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . The court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

In this manner both the supreme obligation of the Constitution of the United States as the law of the land and the power and duty of the courts to declare invalid and void congressional enactments in conflict with it, are derived not from any textual grant of the power to be found in the Constitution, but from the fundamental principle essential to all written constitutions, that any legislative enactment repugnant to the Constitution is not law at all and must be void; and that since courts as well as the other departments of our government are bound by that instrument, obviously, they must declare such conflict and the effect of it, whenever it arises in cases properly brought before them.

Thus, the jurisdiction in courts to declare acts of legislation void, as it is exercised in the United States, springs inevitably and irresistibly from the establishing in our country of laws of various degrees of authority and we have had four such kinds from the beginning, namely, (1) The Constitution of the United States enacted by the people of the entire nation, which is the supreme law of the land, (2) Acts of Congress enacted by representatives of the people with powers limited by the Constitution and which, therefore, are inferior in authority to that instrument, (3) State Constitutions which are inferior to both the Constitution of the United States and to valid Acts of Congress, and (4) State statutes which are subordinate to all of the three preceding kinds of laws.

It is obvious that when a court in the consideration of a case finds two of these laws of differing obligation applicable to it, one, the one of inferior obligation, must yield to the other or decision would be impossible, and since the judicial department of our government is co-ordinate and co-equal with the legislative department, it is not bound to accept the decision of Congress as to what is constitutional, but its duty is to interpret the Constitution for itself and to act upon its own judgment within the field assigned to it by the Constitution and laws made "in pursuance thereof."

Thus, in such judicial review of legislative enactments, the courts with every propriety may be said to be discharging an imperative duty, rather than "usurping" a power over Congress. Even so strict a constructionist as John C. Calhoun, while denying that the power could be derived from any words in the Constitution, said:

"Where there are two or more rules established, one from a higher, and one from lower authority, which may come in conflict in applying them to a particular case, the judge cannot avoid pronouncing in favor of the superior against the inferior."

The validity of the reasoning by which the Supreme Court thus first asserted its power was questioned vigorously as soon as it was announced and critics of it have not been wanting ever since. But although many proposals for amendments to the Constitution intended to modify the power of the courts, thus derived, have been made in Congress and out of it, not one has been received with sufficient popular favor to be even proposed to the States for adoption.[2] The people of our country have been so well satisfied with the origin of the power thus relied upon, and with the use that has been made of it, that after one hundred and twenty years the Supreme Court, when re-stating the doctrine in last April, did so in a paraphrase which is essentially an excerpt from the opinion in Marbury vs. Madison.

While the Supreme Court thus clearly and convincingly asserted its authority and then went forward confidently to exercise it, nevertheless, with self-denying wisdom, in part in Marbury vs. Madison, and more distinctly in later cases, it acknowledged extensive limitations upon its power.

The first limitation relates to the executive power and as announced was that "questions in their nature political, or which are by the Constitution and laws submitted to the executive can never be made in this court."[3] The Court from that day to this has steadily refused to entertain questions of governmental policy—political as distinguished from justiciable questions. And yet more definitely, it was declared that where the head of a department is invested with executive discretion "any application to a court to control, in any respect, his conduct would be rejected without hesitation."[4] This limitation has also been frequently repeated and often observed by the Court from Marshall's day to ours.

Other, but quite as extensive limitations on the power to entrench upon the Legislative Department have been frequently stated by the Court.

Thus it has been declared: that the power to hold an act of Congress invalid is "one of much delicacy which ought seldom if ever to be decided in the affirmative in a doubtful case"[5]; that the Court will presume the validity of an Act until "its violation of the Constitution is proved beyond all reasonable doubt"[6], "beyond rational doubt"[7]; that proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the pre-

2. Warren's "The Supreme Court in U. S. History," Ch. 17.
3. Marbury vs. Madison, 1 Cranch 137, 170.
4. Ibid, 170, 171.
5. Fletcher vs. Peck, 6 Cranch 87, 128.
6. Ogden vs. Saunders, 12 Wheat 213, 270.
7. Minimum Wage Case, Apr. 9, 1923.

sumption that Congress will pass no act not within its constitutional power[8]; that the Court will pass upon the constitutionality of an Act of Congress only when it becomes necessary to do so in a genuine (not moot) case brought before it for decision[9]; that only he who can show that he may be injured by the enforcing of an Act can be permitted to assail its validity[10]; and that the power to enact a law appearing, it shall not be declared unconstitutional on the ground that it is an unwise or inexpedient use of a granted power. For abuse of granted power, resort must be had not to the courts but to the people at the polls.[11]

When to this is added the limitation upon the power of the Courts which springs from the development of the police power of the states, so cordially recognized by the Supreme Court, we see that there is a large field for executive and legislative action into which the Court frankly acknowledges it has no right to enter, and it is apparent, therefore, that it is far from accurate to say, as some critics do, that the Court has arrogated to itself power to declare void all acts of the executive and of Congress and of state legislatures. It is really sheer mis-statement to say that the Supreme Court, in exercising "Judicial Review," assumes a supervisory power over the legislative or executive branch of the government. It never exercises the power to declare legislation invalid except when the decision of a case brought before it renders it necessary and then to refuse to decide the constitutional question would be for the Court to participate in violating the Constitution whenever an act relied upon should be invalid. A decision of the Supreme Court, not warranted by the Constitution, is as invalid as an unconstitutional act of Congress.

While, as we have seen, the Supreme Court very recently was content to rest the origin and exercise of this power of "Judicial Review" wholly upon the reasoning in Marbury vs. Madison, there can be no doubt that the power has been confirmed and strengthened by the careful studies which have been made in recent years, by jurists as distinguished from judges, of our Colonial period, and of the years between the declaring of independence and the adoption of the Constitution, for the purpose of showing the familiarity of our people with such a power, derived from their experience in having acts of Colonial legislatures declared void by the Privy Council because in conflict with a charter, and also from their experience with cases decided in the state courts holding legislative acts in conflict with state constitutions invalid, before the United States Constitution was adopted. Especially confirmatory of the power are the results of the studies showing; the extent to which the placing of it in the courts was considered and approved by the members of the convention which framed the Constitution, and by the members of the conventions in the various states which discussed and adopted it; and the promptness with which the power was exercised by inferior state and federal courts, with public approval, after the adoption of the federal Constitution and before Marbury vs. Madison. If in a restatement of the doctrine, the Supreme Court should approve, with its great authority, the results of these studies, there would be much greater popular appeal in them than there is now and they would be much more noticed by the legal profession. This could be done without detracting at all from the authority of Marshall's pioneer discussion, for in his day the sources so investigated were largely inaccessible.[12]

The statesmen and journalists who think that the season of discontent with the Supreme Court through which we are now passing is the greatest in our history should refer: to conditions in Jefferson's administration just after the decision in Marbury vs. Madison was rendered, and in Jackson's administration after the United States Bank decisions; to the assaults upon the Court after the Dred Scott decision; to the attacks upon it in reconstruction days and after the legal tender cases in 1870-71; and to the extreme criticism that followed the income tax decisions in 1895. But the great institution emerged from this "century of conflict" so strong in the confidence of the country that attacks upon it led even by so popular and potent a man as former President Roosevelt again resulted in much greater injury to its critics than to the Court.

The later decisions which have provoked criticism of the Supreme Court have been rendered in the disposition of social and economic problems — the Federal and other employers' liability acts, laws limiting hours and prescribing conditions of labor, and limiting the right of private contract in the interest of the general welfare. The immediate cause, however, of the present acute criticism of the Court centers in the recent child labor, minimum wage and other five to four decisions, accentuated by the rapidly expanding scope being given to the writ of injunction.

These five to four decisions have been a focus for criticism of the Court for now half a century, beginning promptly upon the rendering of the second legal tender decision in 1871 over-ruling the first one in the year before. The income tax decision reversal in 1895 by the change of the vote of a single Justice arrested the attention of the country as never before to this infirmity in our highest court and the several recent decisions of cases involving economic and social problems have given emphasis to the contention that in the interpretation of the Constitution an unparalleled and fateful power often becomes centered in a single man.

It should be recognized that this is a citicism that is gaining head throughout the country and that it has in it elements of popular appeal which others have not had which render it formidable. It can be expressed in a single crisp sentence, which the man in the street can instantly understand, and which carries an implication of one man power which he is likely instinctively to resent. One man power in soldiers, kings and even in judges has so often proved an agency of injustice and oppression that fear of it is universal. And it should not be forgotten that many a good cause, many a good political institution, even, has been wrecked by a deceitful but taking slogan.

There are many men who think that this new assault upon the Court constitutes a very real danger that this power which they believe most essential to the welfare of our country may be taken away from it or be so modified as to greatly impair our entire system of government, and who also believe that this danger may be avoided in a manner consonant with the best traditions of the Court, by a slight extension in practice of the often repeated self-denying limitation, that Acts of Congress shall not be held invalid

8. U. S. vs. Harris, 106 U. S. 629, 635.
9. American Book Co. vs. Kansas, 193 U. S. 49.
10. Hooker vs. Burr, 194 U. S. 415, 419.
11. McCray vs. U. S. 195, U. S. 27, 55, 56.

12. Judicial Power and Unconstitutional Legislation, Coxe; The Judiciary and the Constitution, Meigs; The Supreme Court and the Constitution, Beard; Power of the Federal Judiciary over Legislation, Dougherty; The Doctrine of Judicial Review, Corwin, and see bibliographic note, p. 1.

save when their conflict with the Constitution is "entirely clear."

The Supreme Court has many times declared itself bound by this rule but never more strongly than in the recent Minimum Wage decision in which it was said "that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt," and that "only clear and indubitable demonstration" that a statute is in conflict with the Constitution will justify its being declared invalid.

But after making this statement, the opinion proceeds to the conclusion that the Act of Congress involved in the case (an exercise of police power applicable to the District of Columbia) was unconstitutional and void although the Chief Justice and Mr. Justice Sanford declared in a carefully reasoned dissenting opinion that in their judgment "on the basis of reason, experience and authority," the act was valid, and although Mr. Justice Holmes declared that in his judgment the power of Congress to enact the law "seems absolutely free from doubt." Mr. Justice Brandeis did not sit in the case but his judicial history renders it clearly a five to four decision.

Treating this much emphasized rule as a reality and not a mere form of words, it is difficult for men not steeped in legalistic thinking and forms of expression to understand how five judges can agree that an Act of Congress is unconstitutional "beyond rational doubt" and that by "clear and indubitable demonstration" they have shown it to be so, when four of their associates, equally able and experienced judges, who have heard the same arguments on the same record declare that to them "upon the basis of reason, experience and authority" the validity of the Act "seems absolutely free from doubt."

This rule is of the utmost importance to our country. It has been, in terms, an essential limitation upon the power to declare Acts of Congress or of state legislatures invalid for more than a century and almost fifty years ago Chief Justice Waite said: "The safety of our institutions depends in no small degree upon a strict observance of it."

It is no new suggestion that if the Court would give real and sympathetic effect to this rule by declining to hold a statute unconstitutional whenever several of the Justices conclude that it is valid—by conceding that two or more being of such opinion in any case must necessarily raise a "rational doubt"—an end would be made of five to four constitutional decisions and great benefit would result to our country and to the Court.

To voluntarily impose upon itself such a restraint as this would add greatly to the confidence of the people in the Court and would very certainly increase its power for high service to the country. Anyone at all acquainted with the temper of the people in this grave matter must fear that if the rule is not observed in some such manner, a greater restraint may be imposed upon the Court by Congress or by the people, probably to the serious detriment of the nation.

But what substitute do the critics of the Federal Courts offer to our country for this jurisdiction which has served us so well for more than one hundred and thirty years?

Some of the constitutional amendments now proposed would result in not much if any greater change in the jurisdiction of the courts than would be accomplished by a cordial recognition of restraints upon their powers which the Supreme Court has itself frequently acknowledged, but others are distinctly revolutionary in character.

If the amendment proposed were adopted, giving Congress authority to nullify by a majority vote any decision by the Supreme Court declaring any law unconstitutional, the result would be a breaking down of our whole present constitutional system, for Congress could then by its sole action change our Constitution at will. While it must always be conceded that members of Congress are as patriotic as judges are and as sincerely desire the welfare of our country as they do, yet the fact remains that such a power in Congress would deprive the Judicial Department of its independence and our Constitution of that stability which is one of its greatest virtues, by rendering its authority as fluctuating as congressional majorities.

While such an "omnipotent power" in the British Parliament has worked well, our people, our situation and our needs are so different from those of the British that it can by no means be safely inferred that it would work well with us and it would be rash in the extreme for us to abandon a system, which with all of its human frailties acknowledged, has served to greatly aid the bringing of our country to its present position of prosperity, of development and power.

Our Constitution makes ample provision for amendment by which erroneous decisions may be corrected but only when two-thirds of both Houses of Congress, or a convention called by Congress on application of two-thirds of the several states, shall deem it necessary, and when three-fourths of the states acting through legislatures or by conventions shall agree upon the changes to be made. Thus was anticipated the doctrine of evolution in government, now so familiar in other fields, for thus it was recognized that gradual and seasoned change is wiser and safer than unrestrained legislative change would be, going, as it often does, hastily, "by leaps and bounds."

With unusual opportunities for observation and viewing conditions from a position as disinterested and detached as any one is likely to occupy, the persons who think that our people are willing to strip the Supreme and other Federal Courts of their power of judicial review and to invest Congress with the supreme power of constitutional interpretation, seem to me to be strangely mistaken.

I close this article as I began asserting with every confidence, that the Supreme Court is, as yet, much more strongly intrenched than Congress is in the confidence of our country, and that if the people thought that that Court was in any real danger of being deprived of its most important and fateful power, a great majority of our citizens would fly to its defense, each regarding it as a matter of his own personal concern.

Instruments of International Commerce

The past few weeks have seen the publication in *Commerce Reports* of accounts of numerous important court rulings relating to those instruments of international commerce which have not yet been definitely defined by law, as the C. I. F. and D/P contracts, the protest of drafts, the clause of substituted jurisdiction in bills of lading, the contract exempting the ocean carrier from liability for its negligence, through bills of lading, and letters of credit. An increase in personnel and equipment in the Division has made possible a better service to that growing corps of American lawyers whose problems arise in every quarter of the globe.

REVIEW OF RECENT SUPREME COURT DECISIONS

North Carolina Property and Franchise Tax on Railroads Held Constitutional—Utah Statute Taxing Mines and Mineral Deposits—New York May Tax Income from Mortgages on Which Recording Tax Has Been Paid, in Spite of Statute Exempting Such Debts from Taxation—Constitutionality of California Sleeping Car Tax—Connecticut Tax on Estate of Decedent, Delinquent for One Year Preceding Death—Other Tax Cases

By Edgar Bronson Tolman

Taxation.—Railroads, Valuation

The North Carolina property and franchise taxes imposed upon railroads for the year 1921 are not obnoxious to the State or Federal Constitutions.

Southern Railway Co. v. *Watts,* Adv. Ops. 199, Sup. Ct. Rep. 192.

In this decision the Supreme Court affirmed on appeal five decrees of District Courts for North Carolina denying injunctions asked by certain railroads against the collection of *ad valorem* property and franchise taxes for the year 1921. The railroads contended that the taxes violated, in several respects, provisions of the Federal and State constitutions. The circumstances relied upon as grounds for this contention were in brief as follows. These taxes are required by the North Carolina constitution to be uniform and *ad valorem* "according to its true value in money." For many years all property had been much undervalued. By a Revaluation Act of 1919 the valuation of real estate was entrusted to county boards, and that of railroad property to a State board, the assessment so made to be allocated to the counties on a mileage basis. These assessments were all subject to legislative approval. The application of this Act resulted in doubling the assessments of railroad property and quadrupling those of real estate. As a consequence railroad taxes for 1920 were lower than they had been before. In that year, however, real estate suffered a decrease in actual value, and to correct the situation the Act of 1921 was passed. This allowed tax payers to apply to the assessing boards to correct assessments where they exceeded actual value. In two thirds of the counties of the State assessments of real property were reduced, but when the railroads applied for reductions, one was granted to the Norfolk & Southern only. Other companies, denied the reduction, then began these suits.

Mr. Justice Brandeis delivered the opinion of the Court. After stating the facts, he held that the railroads were not discriminated against because real estate owners only were given an appeal to the State Board of Equalization or because the valuations of real estate were as a class provisionally reduced, whereas the railroads had themselves to initiate reductions as regards their property. He said:

> The differences in the classes of property, and in the conditions of ownership, obviously made difference in treatment unavoidable. Differences in the machinery for assessment or equalization do not constitute a denial of equal protection of the laws.

He continued:

> The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards, proceeding under Section 28a of the Act of 1921, reduced real estate valuations quite generally, but that the State board, . . . refused to reduce the valuation of any railroad except that of the Norfolk & Southern. The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others (citing case). This may be true although the discrimination is practiced through the action of different officials (citing case). But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause (citing cases). Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. Strong evidence to the contrary is furnished by the fact that in 33 counties, including those in which the largest cities are located, no reduction was made in the valuation of real estate and that in the remaining 67 counties the reduction varied from 1 to 50 per cent. Plaintiffs have failed, likewise, in showing systematic refusal on the part of the State board to allow a proper reduction in the valuation of any railroad. The further contention that by reduction of the Norfolk & Southern's assessment the other plaintiffs were discriminated against is also unfounded.

The contentions that the due process and commerce clauses of the Federal Constitution, and the State Constitution, were violated, he disposed of briefly, and then considered the contention that the method of valuation prescribed by the Act of 1921 was not followed. He said:

> It is argued, among other things, that there was no separate assessment of tangible and intangible property; or if so, that plaintiffs were not notified as to what that separation was; that there was no due consideration of the actual cost of replacement of the property, with just allowance for depreciation of rolling stock; that the franchise or intangible value was not assessed by a due consideration of the gross earnings as compared with operating expenses, or of the market value of the stocks and bonds; that the particular method prescribed by the statutes for assessing interstate roads was not followed; and that erroneous methods of valuation were adopted. To these contentions there appear to be several answers. The Revaluation Act did not make mandatory any particular method of valuation. The legislature recognized that the difficulties inherent in valuing a railroad are great. It desired that the valuers should have access to every fact which might aid them in performing their duty. The data concerning the railroads referred to in the act, like the methods of valuation referred to in earlier and later legislation, are among those commonly used when an attempt is made to ascertain the value of a railroad. But they are merely aids. Such data are commonly in the possession of the railroad companies; and are often not readily accessible to others. The legislature, by the Revaluation Act authorized the State board to require the railroads to furnish the information. But it did not undertake to prescribe to what extent or how the information should be used by them. Their duty was merely to exercise an informed and honest judgment in fixing values for purposes of taxation (citing case). Another answer to plaintiffs' contention is that mere failure to follow methods of valuation referred to in earlier statutes could not, in any event, render illegal the revaluation made by the

State board in 1920; since it was, by the Revaluation Act, made tentative merely.

To the argument that the franchise tax was an additional property tax not imposed on other taxpayers, he replied in part:

> It is true that the franchise tax is measured by the value of property already subjected to the *ad valorem* tax. But the privilege tax is not converted into a property tax because it is measured by the value of property (citing case); nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the State.

He continued:

> Nor is there any basis for the claim that the franchise tax act violates the commerce clause. The tax appears to be upon the privilege of doing an interstate business (citing case). It is not of the character which is held a burden upon interstate commerce (citing cases). Payment of the tax is not made a condition precedent to granting a railroad permission to do interstate business (citing cases). And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce.

The case was argued by Mr. S. R. Prince for the Southern Railway Company and the Atlantic & Yadkin Railway Company, by Mr. Murray Allen for the Seaboard Airline Railway Company, by Mr. W. B. Rodman for the Atlantic Coast Line Railway Company, and by Messrs. James S. Manning, Attorney General of North Carolina, William P. Bynum and Sidney S. Alderman for the taxing authorities.

Taxation.—Mines

The Utah statute taxing mines and mineral deposits does not apply to tailings separated from their place of origin.

South Utah Mines & Smelters v. *Beaver County*, Adv. Ops. 608, Sup. Ct. Rep. 577.

The Constitution of Utah requires property to be taxed in proportion to its value, and provides that mines shall be assessed "at a value based on some multiple or sub-multiple of the net annual proceeds thereof." The legislature accordingly made three times the net annual proceeds the measure of value, and defined the words broadly to include the amount realized from sale or conversion of all ores, including dumps or tailings, extracted by the owner, lessee, contractor or other person.

The owner of a copper mine which had exhausted in 1914 all ores that could profitably be mined, made a contract with a leasing company, upon a royalty basis, to reduce nearly nine million tons of tailings accumulated beside the concentrating mill. During the period of the activity of the mine the ores had been hauled from the mine to the mill, and the tailings represented the dross of nine years. In 1918 the leasing company recovered the net amount of $120,547. The taxing authorities tripled this sum and upon the multiple assessed and collected the tax against the owner's mining property for the year 1919. The mine owner brought suit to recover the tax in the District Court for the District of Utah, and upon wirt of error the Supreme Court reversed judgment entered for defendant.

Mr. Justice Sutherland delivered the opinion of the Court. After denying defendant's motion to dismiss the writ of error, he made clear how the constitutional rule of valuation recognized that the hidden wealth of mines could be valued only by taking some fair estimate. He then said:

> Undoubtedly in fixing the multiple of the net annual proceeds upon which the value of metaliferous mines is to be calculated a good deal of latitude must be allowed the legislature and the taxing authorities, but the power is not unbounded. Without attempting to delimit the boundaries—a matter primarily for the State courts—it is sufficient for present purposes to say that in our opinion they have been clearly exceeded in the instant case. The net proceeds here involved arose from a lot of refuse material, which, long prior to the imposition of the tax, had been severed from the mining claims, removed to a distance, submitted to the process of reduction and stored upon lands separate and apart from the claims. Moreover, but one-tenth of the amount of these net proceeds was realized by the owner of the mining claims. To treble the total of these proceeds for the purpose of basing thereon an altogether fictitious value for a mine worked out and worthless years before the adoption of the statutory provisions supposed to confer the authority to do so, results in such flagrant and palpable injustice as would cast the most serious doubt upon the constitutionality of such provisions if thus construed.
>
> The rule prescribed for the valuation of metaliferous mines, as we have already indicated, is one of necessity, and should not be extended to cases clearly not within the reason of the rule. The tailings, severed and removed from the mining claims, changed in character, placed on other and separate lands and having an ascertained and adjudicated value of their own, in our opinion, constituted a unit of property entirely apart from the mine from which they had been taken (citing case). We think the agreement with the leasing company was not a sale of these tailings, but that the ownership, pending the process of reduction, remained in plaintiff. The plaintiff, therefore was subject to taxation upon their value, but not as a mine since that implies something capable of being mined which this loose and homogeneous deposit obviously was not.

The case was argued by Mr. C. C. Parsons for the mining company and by Messrs. Harvey H. Cluff and William A. Hilton for the taxing authorities.

Taxation.—Mortgages, Obligation of Contracts

The New York statute exempting from taxation debts secured by a mortgage upon which a recording fee has been paid does not prevent the State from taxing the income therefrom.

New York ex. rel. Clyde v. *State Tax Commissioner of New York*, Adv. Ops. 561, Sup. Ct. Rep. 501.

The relator paid State income taxes upon certain bonds secured by mortgages upon which a mortgage recording tax had been paid, and also upon secured debts which had likewise been the subject of a special State tax. Contending that the imposition of the income tax impaired the obligation of contracts made by the statutes laying the first taxes, she brought suit to recover the amount paid. Being unsuccessful in the New York courts both of first instance and of appeal, she brought the case by writ of error to the Supreme Court of the United States where the judgment was affirmed.

Mr. Justice Holmes delivered the opinion of the Court. The nature of the statute in question and of the argument of the Court in opposition to relator's contention is sufficiently indicated by the following excerpts:

> The Mortgage Recording Tax Law, Article XI, Sec. 251, provides that mortgages of real property situated within the State that are taxed by that article and the debts and obligations that they secure shall be exempt from other taxation by the State and local subdivisions. The caution that should be used before interpreting such declarations of legislative policy as promises, even when they manifestly tend and are expected to induce voluntary action is illustrated in (certain cases). But the Appellate

Division, in the case that we have cited, while having this caution in mind, preferred to assume without deciding that there was a contract of exemption, but held that it did not extend to this income tax. The Court recognized that for many purposes a tax upon the interest received from a mortgage debt is a tax upon the mortgage; but for the purpose of construing the words of a statute it rightly recognized that a distinction might be taken. That a distinction was intended, or rather that the Legislature had in mind only a tax upon the principal debt or obligation it deduced from a nice consideration of the words of the statute, which led it to the conclusion that "the dominant idea in the mind of the Legislature was to render mortgagees independent of the action, capricious or otherwise, of local tax officials." Considering that only the principal of mortgages was taxed when the law was passed and that in those days no one thought of an income tax; that any contract of exemption must be shown to have been indisputably within the intention of the Legislature; that it is difficult to believe that the Legislature meant to barter away all its powers to meet future exigencies for the mere payment of a mortgage recording tax; and that a tax upon the individual measured by net income might be regarded as one step removed from a tax on the capital from which the income was derived, (citing case): it held that there was no promise that the present tax should not be imposed. With regard to the mortgages the conclusion does not seem to us very difficult to reach. The State did not need to offer a bargain to induce mortgagees to record their deeds.

With regard to the tax on the secured debts other than mortgages, the learned Justice likewise affirmed the conclusion of the New York court, assuming that it had sustained the income tax on the ground that the exemption granted by the special taxing statute did not extend to the interest on the debts.

The case was argued by Mr. Arthur E. Goddard for the taxpayer and by Messrs. Francis W. Cullen, James S. Y. Ivins and Claude T. Dawes for the tax authorities.

Taxation.—Interstate Commerce

A tax upon the property within the State of a sleeping car company measured by the gross receipts from the use of the property within the State does not unconstitutionally burden interstate commerce.

The Pullman Co. v. *Richardson,* Adv. Ops. 397. Sup. Ct. Rep. 366.

The Pullman Company brought suit to recover taxes paid under protest and imposed by virtue of a California statute taxing the property used within the State of sleeping car companies. The tax was computed by a percentage of gross receipts, and with respect to companies, such as the plaintiff, operating partly within and partly without the State, gross receipts were to be determined by taking that portion of the entire receipts represented by the proportion borne by the mileage within the State to the entire mileage. The tax was enforced, among other means, by the forfeiture of the right of the corporation to do business within the State. Having been unsuccessful in the State courts, the company brought the case by writ of error from the Supreme Court of California to the Supreme Court of the United States, where the judgment was affirmed.

Mr. Justice Van Devanter delivered the opinion of the Court. He stated the constitutional objections of the company thus:

> The company insists that the tax in question and the provisions therefor in the state constitution and statutes are invalid under the commerce clause of the Constitution of the United States, because (a) the tax is laid on gross receipts from interstate commerce, and (b) its payment is made a condition to continuing an interstate business within the State, and are invalid under the due process of law clause of the Fourteenth Amendment, because the tax is intended to reach income from property situated and business done without the State.

The learned Justice replied to these contentions as follows:

> The principles to be applied in cases of this class repeatedly have been considered by this court and are now settled.
>
> A State can neither tax the act of engaging in interstate commerce nor lay a tax on gross receipts therefrom. In either case the tax would be a restraint or burden on such commerce and its imposition an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution (citing cases).
>
> The rule is otherwise with property used in interstate commerce. A State within whose limits such property is permanently located or commonly used may tax it (citing cases). . . .
>
> In taxing property so situated and used a State may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce (citing cases).
>
> An examination of the tax in question in the light of these principles shows that the chief objection urged against it is not tenable. The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all other taxes on such property. The Supreme Court of the State holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this Court as a property tax in *United States Express Co.* v. *Minnesota* and *Cudahy Packing Co.* v. *Minnesota,* above cited. True it is computed with special regard to the gross receipts, but this, as is fairly shown, is done merely as a means of getting at the full value of the property, considering its nature and use. The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on property valued as part of a going concern, nor to be relatively higher than the taxes on other kinds of property. There is no ground for thinking that it operates as a discrimination against interstate commerce.
>
> The statutory provision that a foreign corporation which fails to pay the tax shall be excluded from doing business in the State requires but brief notice. It is not sought to be enforced here. The Pullman Company has not failed to pay the tax. The provision has not been construed by the State court. If it be construed as covering interstate commerce it is void, for the right to engage in such commerce is not within the State's control.

The case was argued by Mr. C. A. Severance for the Company and by Messrs. U. S. Webb and Raymond Benjamin for the State authorities.

Taxation.—Exports from States

A sale by a manufacturer to a broker to fill an export order, where title passes upon delivery on board the vessel by the manufacturer, is exempt from taxation under the Federal Constitution.

A. G. Spaulding & Bros. v. *Edwards,* Adv. Ops. 539. Sup. Ct. Rep. 485.

Under the War Revenue Act, taxing "all baseball bats . . . sold by the manufacturer, producer or importer," a tax was levied on baseball bats ordered by Scholtz & Co., New York commission merchants, of A. G. Spaulding & Bros. in behalf of a Venezuela firm. Scholtz & Co. sent an export order to A. G. Spaulding & Bros. telling them to deliver the goods addressed to Venezuela and appropriately marked, to a certain steamship company. The transaction was understood to be for the purpose of exporting the goods to Venezuela. The complaint of A. G. Spaulding & Bros. to recover the tax was dismissed on demurrer by the District Court for the Southern District of New York, but

on writ of error to the Supreme Court, the judgment was reversed.

Mr. Justice Holmes delivered the opinion of the Court. He said in part:

> The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands. . .
>
> To answer it with regard to any transactions we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants (citing cases). On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.
>
> The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain bats and balls for their own use. There was not the slightest probability of any such change and it did not occur.

The case was argued by Mr. Frank Davis, Jr., for the manufacturer, and by Solicitor General Beck for the taxing authorities.

Taxation.—Due Process, Estates

A tax of 2% per annum for five years preceding death upon all the estate of a decedent that has not paid a state or municipal tax for the year preceding death does not deny due process to the creditors or distributees.

Bankers Trust Co. v. *Blodgett,* Adv. Ops. 259, Sup. Ct. Rep. 233.

In 1915 Connecticut passed a statute imposing a tax of 2 per cent per annum for five years preceding the date of the death of a decedent upon the appraised inventory value of such of his estate as had paid no town, city or state tax the year preceding his death. In 1919 one Lena McMullen died, her executors filed required information as to her estate, and thereupon the Tax Commissioner assessed a tax of $10,286.39, by virtue of the statute in question. The executors took the appeal provided by the statute to the State courts, contending the act to be unconstitutional. The Supreme Court of Errors held the act valid, and advised the Superior Court to sustain the demurrer of the taxing authorities. From the resulting decree of the Superior Court the executors brought the case by writ of error to the Supreme Court of the United States, where the decree was affirmed.

Mr. Justice McKenna delivered the opinion of the Court. The plaintiffs in error contended that the statute denied creditors and distributees due process

> (a) by exacting a penalty from them for the failure of the decedent to list his property for taxation and, (b) by creating against them a presumption of guilt for such omission.

The learned Justice said in part:

> The conclusion of the court is of such authoritative effect as not to need much comment. The attack upon it by plaintiffs in error is based upon confusion of rights. As pointed out by the Supreme Court of Errors, executors and administrators do not own the property committed to them for administration. It goes to them subject to the liabilities and burdens upon it in the hands of its owner and whatever interest distributees or creditors may have is subject to the same liabilities and burdens. Subject, we may say, as the Court decided, to the tax which the State has imposed on its disposition or devolution, and the tax does not take on a different quality or incident because it is, or has the effect of a penalty. And the Court, construing the statute, declared it was a provision for penalizing a delinquency—the delinquency of the decedent, and made to survive "by statutory sanction." "In effect," the Court said, "this statute is a penalty imposed upon the estate because of the delinquency of the decedent and no less permissible than the penalty tax against the decedent kept alive by statutory sanction."
>
> . . . There was an evasion of duty by decedent, and the obligation she incurred, and should have discharged, was imposed upon her estate, and legally imposed, for out of her estate it can only be discharged. The payment of taxes is an obvious and insistent duty, and its sanction is usually punitive. The Connecticut statute is not, therefore, in its penal effects, unique, nor are they out of relation or proportion to a decedent's delinquency.
>
> The Court of Errors recognized that the tax of the statute "may not represent what the decedent would have been required to pay had" she "paid the state or local tax." And, as we have seen, the tax may be upon the appraised inventory value for the five years next preceding the death of the decedent with a proportionate deduction if a tax has been paid on any of the property for a portion of the five years, or that the ownership of the property has not been in the decedent for a portion of that period. The provision, however, is but a way of fixing a penalty for the delinquency, which it is competent for the State to do.

The case was argued by Mr. William H. Comley for the executors.

Taxation.—Income Tax, Stock Distribution

A gain accruing to a stockholder by reorganization of a corporation is subject to the federal income tax although segregated by a dividend in liquidation.

Cullinan v. *Walker,* Adv. Ops. 550, Sup. Ct. Rep. 495.

A Texas oil company underwent a reorganization whereby the original corporation was dissolved, the trustees in liquidation transferring one-half the assets of the original corporation to each of two new corporations, one a producing company and the other a pipe line concern. For a capital stock of $100,000 they received from each new company $1,500,000 par value of stock and $1,500,000 par value of bonds. The stock was in turn transferred to a third holding corporation in exchange for $3,000,000 of its stock. This stock and the bonds were distributed *pro rata* among the stockholders of the original company. Cullinan, one of the trustees, had held stock for which he had paid $26,640, and as a result of the reorganization he received securities aggregating in value $1,598,400. On this gain the federal income tax was imposed, and Cullinan brought suit to recover the amount paid. He contended the situation resembled that in Eisner v. Macomber, 252 U. S. 189, whereas the Collector insisted that the gain was taxable under the principle of United States v. Phellis, 257 U. S. 156, and Rockefeller v. United States, 257 U. S. 176. Judgment for defendant entered by the District Court for the Southern District of Texas was affirmed when the case was brought to the Supreme Court by writ of error.

Mr. Justice Brandeis delivered the opinion of the Court. He said:

> Cullinan insists that his gain so ascertained was merely an incident of a reorganization. This was equally true in the Phellis and the Rockefeller cases. It is sought to differentiate those cases on the ground, that there the distributed stock of the new corporation was technically a dividend paid out of surplus; and that here the segre-

gation is not of that character. But the gain, which when segregated becomes legally income subject to the tax, may be segregated by a dividend in liquidation, as well as by the ordinary dividend. If the trustees in liquidation had sold all the assets for $6,000,000 in cash, and had distributed all of that, no one would question that the late stockholders of Farmers Petroleum Company would, in the aggregate, have received a gain of $5,900,000, taxable as income. The result would obviously have been the same, if the trustees had taken in payment and distributed, bonds of the value of $6,000,000, in some new corporation. And the result must, also, be the same where that taken in payment is $3,000,000 of such bonds and $3,000,000 in stock of a third corporation. All the material elements which differentiate the Phellis and Rockefeller cases from Eisner v. Macomber are present also here. The corporation, whose stock the trustees distributed, was a holding company. In this respect, it differed from Farmers Petroleum Company, which was a producing and pipe line company. It differed from the latter, also, because it was organized under the laws of another State. It is true that, at the time this Delaware corporation's stock was distributed, it held the stock of the new oil producing company and likewise the stock of the new pipe line company. But the Delaware corporation was a holding company. It was free, at any time, to sell the whole, or any part, of the stock in either of the new Texas companies and to invest the proceeds otherwise. By such a sale, and change of investments, all interest of the holding company in the original enterprise might be parted with, without, in any way, affecting the rights of its own stockholders. When the trustees in liquidation distributed the securities in the three new corporations, Cullinan, in a legal sense, realized his gain; and became taxable on it as income for the year 1916.

The case was argued by Mr. John Walsh for Cullinan and by Solicitor General Beck for the federal authorities.

Taxation.—Injunction

Suit may not be maintained to enjoin the collection of a tax although the tax is barred by limitation, and although the taxpayer has delayed making payment until the period allowed for proceedings to recover the tax has elapsed.

Graham v. *Dupont*, Adv. Ops. 653, Sup. Ct. Rep. 567.

In the reorganization of the Dupont Powder Company in the year 1915 Alfred I. Dupont realized a gain which he did not regard as income taxable under the federal Income Tax Law. On December 31, 1919, following an investigation, the taxing authorities notified him of an additional assessment of $1,576,015.06. He immediately replied that the assessment was illegal because the law required an additional assessment to be made within three years. On March 8, 1920, he filed a claim for abatement. Subsequently, by agreement among all the stockholders, one stockholder, Phellis, paid his tax and brought suit to recover it; the claims for abatement were held pending until the question of law should be decided. In November, 1921, the Supreme Court held that the gain represented taxable income. Thereafter Dupont filed this bill to enjoin the Collector of Internal Revenue from levying a distraint against his property, and the District Court of Delaware granted a temporary injunction, which was affirmed by the Circuit Court of Appeals for the Third Circuit. These courts held that Section 3224, Revised Statutes, forbidding the maintenance of any suit to restrain the assessment or collection of any tax, was subject to an exception where the taxpayer, had he paid the tax at the time the suit for an injunction was filed, could not have brought suit to recover it back because it would have been barred by the statutory limit of time in which such a suit could be brought. The Supreme Court, however, reversed the decree and remanded the case with directions to dissolve the temporary injunction and to dismiss the bill.

The CHIEF JUSTICE delivered the opinion of the Court. Omitting a statement of the facts, here abridged, and a discussion of authorities, his opinion was as follows:

> The Court based its conclusion on Section 252 of the Revenue Act of 1918 (40 Stat. 1085, ch. 18), reenacted in the Revenue Act of 1921 (42 Stat., Pt. 1, p. 268, ch. 136), which reads as follows:
>
> "If upon examination of any return of income made pursuant to . . . the Act of October 3, 1913 . . . it appears that an amount of income . . . tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 R. S. the amount of the excess shall be credited against any income . . . taxes, or instalments thereof then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the tax payer; Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer."
>
> The return was due March 15, 1916. The assessment was made December 31, 1919. The complainant might then have paid the tax and would have had two years in which to make his claim, and if rejected, to sue to recover it back if, as he now submits, Section 252 limited his right to pay and sue to recover. Under such a construction and application of Section 252, suit must have been brought on or before March 15, 1921. This is what Phellis did (United States v. Phellis, 257 U. S. 156) and there was no question raised as to his right to bring the suit in the Court of Claims to recover back the tax paid by him if it had proved to be illegally assessed and collected. Certainly complainant could not, by delaying his payment until his right to sue to recover it back expired, make a case so extraordinary and entirely exceptional as to render Section 3224, Revised Statutes, inapplicable.
>
> If it be said that he was waiting for the Commissioner to act on his claim for abatement of the assessment, it is enough to say that the Commissioner's delay until after the decision of the Phellis case in November, 1921, was due to agreement by the parties. Nor was he prevented from paying the assessment by his claim for abatement.

The case was argued by Solicitor General Beck for the federal authorities and by Mr. William A. Glasgow, Jr., for Dupont.

Lord Mansfield on Parental Resemblance

"Those who are interested in this point of medical jurisprudence, Resemblance as Evidence of Consanguinity, may be referred back to the famous Douglas Cause of 1769, the most sensational lawsuit of its century. In the House of Lords, Lord Mansfield, enlarging upon the greater scope for drawing helpful inferences from physical likeness amongst human beings than in the rest of the world, said 'a man might survey 10,000 people before he saw two faces perfectly alike,' while Camden, then Lord Chancellor, in language more rhetorical than judicial, spoke of the physical likeness in the case as 'an impression stamped by God himself to prove the legitimacy of the child.' But modern science, we fancy, would not agree either with the alleged empirical fact of this supposed striking resemblance between parent and offspring, nor yet with the theological explanation of it which Lord Camden finds in 'Divine Purpose.' It seems unlikely that Providence interferes so directly in human affairs. Nevertheless, some judicial notice must clearly be taken of the general principle of heredity, and, as the *Lancet* remarks, modern judges who deem themselves sufficiently familiar with the course of nature to be able to take judical notice that a woman of seventy will have no more children, and that a husband's non-access for two years disproves the legitimacy of his wife's child, will need no aid from scientific witnesses to assure them that 'Like is apt to beget like.' "—*The Solicitors' Journal & Weekly Reporter, Sept. 1, 1923.*

TRADE REGULATION

A Department Devoted to a Review of Recent Federal Trade Commission Rulings and of Court Decisions Relating to Unfair Competitive Practices

The Extent of the Jurisdiction of the Federal Trade Commission Over Unfair Methods of Competition*

SECTION 5 of the Federal Trade Commission Act[1] provides "That unfair methods of competition are hereby declared unlawful . . . Whenever the Commission shall have reason to believe that any person, partnership or corporation has been or is using unfair methods of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint." Nowhere in the statute is any definition of "unfair methods of competition" attempted. The framers of the Act believed it would be better to insert a general provision condemning unfair competition and to have each case determined upon its own facts, rather than to attempt to define the numerous unfair practices, owing to the multifarious means by which an unfair advantage over competitors is sought to be achieved and through fear lest the inevitable rigidity of any definition might fail to provide for every case which might arise.[2] Obviously, this placed upon the courts the task of determining by the method of exclusion and inclusion the meaning of the phrase and the extent of the jurisdiction thereby conferred upon the Federal Trade Commission.

In construing statutes of doubtful meaning it is permissible to look into the history of the times when the legislation was in preparation for enactment, and to examine the discussions and explanations of it before congressional committees and upon the floor of the house.[3] In the recent case of L. B. Silver Co. v. Federal Trade Commission[4] which modified and affirmed an order of the Commission condemning the advertising by a stock breeder of untrue statements of the pedigree of his hogs which sold in competition with other hogs of a similar breed, Circuit Judge Dennison in a vigorous dissenting opinion concluded after such an investigation of the history of the Act that: (1) the Federal Trade Commission Act was passed together with the Clayton Act in furtherance of the Wilson Administration's program of avoiding the evils of trusts and monopolies by means of the regulation of competition; the Clayton Act extending and defining the anti-trust laws while the Federal Trade Commission Act created a suitable administrative body for their enforcement. (2) The advocates of the Act intended it to prevent only those unfair practices which if permitted to continue would result in monopoly or undue restraint of trade. (3) To hold that the Act confers jurisdiction over unfair practices having *no* tendency towards monopoly opens too vast a field of government regulation of business. (4) If it be held that a broader jurisdiction is granted by the Act, then the public interest clause limits the Commission to such unfair practices as affect not a small part but rather the great mass of the public. (5) Moreover, those unjustiable acts of competitors for which the existing law provides a remedy are not within the jurisdiction of the Commission.

As to the first two conclusions, it should be noted that other students of the history of the Act have reached an opposite conclusion. Mr. Gilbert H. Montague after examining the reports of the Senate debate upon the bill concluded[5] (1) the greatest divergence of opinion existed as to the meaning of unfair competition; (2) the chief supporters of the bill gave the term a meaning which included besides practices tending towards monopoly, practices forbidden by the common law of "unfair competition"; (3) many of the supporters gave the term a meaning even wider than it possessed at common law. Mr. W. H. S. Stevens seconds Montague's third conclusion.[6] Since the legislative intention is apparently in dispute, it is clear that it cannot be controlling in determining the scope of the jurisdiction conferred by the statute.

As to the learned judge's third conclusion, i.e., that taking jurisdiction over unfair practices having no monopolistic tendency opens too vast a field of government regulation of business,—the experience of the Commission acting under such a broad interpretation has shown that such regulation is not only practicable but also desirable. As to the latter, however, opinions may differ. Judge Dennison's two remaining conclusions will be discussed later.

It is submitted that Congress might conceivably have given the Commission jurisdiction over any or all of the following situations: (1) Practices tending towards the creation of a monopoly or the undue restraint of trade. (2) Practices having no monopolistic tendency, but which are otherwise injurious to competitors and to the public. (3) Practices injurious to competitors, but not directly affecting any considerable part of the public. In each of these divisions we may have two subdivisions: (a) Practices forbidden by the common law; (b) Practices believed to be unfair by the Commission though not illegal at common law.

The Supreme Court in the first case before it under the Act interpreted the statute as follows: "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to

*This study is the basis also of a note appearing in the December, 1923 issue of the Columbia Law Review.

1. (1914) 38 Stat. 717, §5, U. S. Comp. Stat. (1916) §8836e.

2. See Report Senate Committee on Interstate Commerce, June 13, 1914, 63rd Cong., 2nd Sess. No. 597, p. 13 cited in the margin in Federal Trade Comm. v. Gratz (1919) 253 U. S. 421, 431, 436, 40 Sup. Ct. 584; Federal Trade Comm. v. Beech-Nut Co. (1922) 257 U. S. 441, 453, 42 Sup. Ct. 150.

3. See Smith v. Gilliam (D.C. 1922) 282 Fed. 633, 636; See Hoover v. Intercity Radio Co. (C.C.A. 1923) 286 Fed. 1003, 1006.

4. (C.C.A. 1923) 289 Fed. 985, 998.

5. See Montague, Unfair Methods of Competition (1915) 25 Yale Law Journ. 20.

6. See Stevens, Resale Price Maintenance as Unfair Competition (1919) 19 Columbia Law Rev. 265, 266, n. 2.

practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter tree and fair competition as commonly understood and practiced by honorable opponents in trade."[7] While none of the later cases attempts to specifically elucidate this dictum, yet it has so often been quoted with approval[8] that it is worthy of most careful study. Moreover, the holdings of the cases decided after it give us something of an interpretation and detailed explanation of it.

It is universally agreed that one purpose of the Act was to more efficiently enforce the various anti-trust laws.[9] It is therefore universally conceded that the Commission has jurisdiction over practices tending to create a monopoly or an undue restraint of trade.[10]

This, however, is not the only situation where the Commission has jurisdiction. The Circuit Court of Appeals of the 7th Circuit, in one of the earliest cases decided under the Act,[11] affirmed an order of the Commission forbidding false advertising which discredited competitors and deceived the public although no tendency to create a monopoly thereby was shown. The Supreme Court in a later case[12] in affirming an order forbidding false labelling, apparently required only an injury to competitors and one to the general public to give the Commission jurisdiction. The Circuit Courts of Appeals following this case have held that the jurisdiction exists even where the unfair methods have no tendency towards monopoly.[13] This branch of the Commission's jurisdiction, which if intended at all by the framers of the Act was probably not their primary purpose, has become, at least numerically, the most important. More than four-fifths of the Commission's orders in the last few years have dealt with practices having no monopolistic tendencies. From July 1st, 1921 to May 21st, 1922 out of more than 65 orders issued by the Commission, only 5 concerned practices tending towards monopoly. Of 22 orders issued from May to October, 1923, 4 have dealt with practices forbidden by the Clayton or Sherman Acts.[14]

The Act provides that the Commission may issue a complaint where "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." The draftsmen appear to have inserted this provision in order to "prevent the Commission from becoming a clearing house to settle the every day disputes of competitors, free from detriment to the public, which should be settled through the ordinary processes of the courts."[15] It has accordingly been held that only such practices as are unfair to the public in general rather than to private individuals are condemned by the Act. Only one case has been found in which the Commission was reversed where the lack of a public interest was given as one ground of the decision.[16] The Supreme Court has not yet determined the size or relative importance of that part of the public which must be injured by an unfair method of competition so as to make a proceeding therein to the interest of the public. The Circuit Court of Appeals cases do not require that the public as a whole be injured; the Commission's orders to cease and desist have been affirmed where only a relatively small part of the public was injuriously affected.[17] It is submitted that the Act by its terms leaves the determination of when a proceeding is to the interest of the public to the discretion of the Commission; the Commission's determination should be overruled only where there has been an unreasonable abuse of discretion. That it is not always easy to determine when a sufficient public interest exists is evidenced by the recent order of Federal Trade Commission v. Caravel Co. (June 21, 1923) Fed. Trade Comm. Docket No. 792. The defendant, an exporter, had shipped "California Pippins," an inferior grade of apples, when the order called for "Oregon Pippins" and by invoicing the inferior apples as "Oregon Pippins" on the bill of lading, had succeeded in obtaining payment from the importer's bank. An order to cease and desist from falsely describing articles shipped in foreign commerce for the purpose of obtaining payment was issued.[18] Unless it can be held that the defendant's act by depriving the Oregon apple-growers of an order, or by bringing American exporters into disrepute with foreign buyers is unfair to the public in general, it would seem that the Commission is here taking jurisdiction of a private wrong for which the courts furnish adequate relief. It is submitted that the determination of what constitutes a reasonable amount of public interest will ultimately depend upon whether the courts desire to extend or to limit the jurisdiction of the Commission.

Having determined that the jurisdiction of the Commission extends to the first two but probably not to the third of the situations enumerated above, we come now to the consideration of whether the Commission is limited by the common law conception of "unfair competition" or whether it may create new categories of "unfair methods of competition." Mr. Justice McReynolds for the Supreme Court said in defining unfair methods of competition as quoted above, "They are clearly inapplicable to practices never *heretofore* regarded as opposed to good morals."[19] Mr. Justice Buffington for the Circuit Court of Appeals for the 3rd Circuit said, "Manifestly, Congress did not mean to confer upon the Federal Trade Commission the power to

7. McReynolds, J., in Federal Trade Comm. v. Gratz, supra, footnote 2, pp. 427-8.

8. See Federal Trade Comm. v. Beech-Nut Co., supra, footnote 2, pp. 452-4; Federal Trade Comm. v. Sinclair Refining Co. (1923) 43 Sup. Ct. 450, 453; Mennen Co. v. Federal Trade Comm. (C.C.A. 1923) 288 Fed. 774, 777; Standard Oil Co. v. Federal Trade Comm. (C.C.A. 1922) 282 Fed. 81, 86.

9. See Brandeis, J., in Federal Trade Comm. v. Gratz, supra, footnote 2, p. 433-5.

10. Federal Trade Comm. v. Beech-Nut Co., supra, footnote 2; National Harness Mfr's. Ass'n. v. Federal Trade Comm. (C.C.A. 1920) 268 Fed. 705.

11. Sears, Roebuck & Co. v. Federal Trade Comm. (C.C.A. 1919) 258 Fed. 307.

12. Federal Trade Comm. v. Winsted Co. (1922) 258 U. S. 483, 42 Sup. Ct. 384.

13. Royal Baking Powder Co. v. Federal Trade Comm. (1922) 281 Fed. 744; Guarantee Veterinary Co. v. Federal Trade Comm. (1922) 285 Fed. 853; L. B. Silver Co. v. Federal Trade Comm., supra, footnote 4; but cf. dissenting opinion, p. 992 et seq.

14. See Vol. 4 Federal Trade Comm. Decisions. For a review of some recent orders of the Commission see Oliphant, Trade Regulation (1923) 9 Amer. Bar Ass'n. Journ. 311, 312.

15. See Vol. 61 Congressional Record 14930 and 19436 cited in L. B. Silver Co. v. Federal Trade Comm., supra, footnote 4, p. 997.

16. "It seems to us that §5 is intended to provide a method of preventing practices unfair to the *general* public." (Italics ours). Federal Trade Comm. v. Gratz, (C.C.A. 1919) 258 Fed. 314, aff'd. (1919) 253 U. S. 421, where it was said p. 428, "Nothing is alleged which would justify the conclusion that the public suffered injury."

17. Guarantee Veterinary Co. v. Federal Trade Comm.; L. B. Silver Co. v. Federal Trade Comm., supra, footnote 13.

18. The Webb Pomerene Law (1918) 40 Stat. at L. 516, §4 extends the jurisdiction of the Federal Trade Commission to unfair methods of competition in the export trade.

19. See Federal Trade Comm. v. Gratz, supra, footnote 2, p. 427.

grant injunctions in cases of business competition where courts would not be justified in granting injunctions."[20] These dicta would limit the Commission to the common law boundaries of unfair competition. On the other hand Mr. Stevens and Mr. Montague cited above, believe from an examination of the history of the Act that Congress intended the Commission to have jurisdiction over practices not yet forbidden by the common law. Mr. Justice Page for the Circuit Court of Appeals for the 7th Circuit said, "It is not conceived that Congress . . . intended to either limit or extend the matters which constituted unfair methods of competition prior to the passage of the Clayton Act, but that its object was the creation of a Board of Commissioners who are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity to injure competitors directly or through the deception of purchasers, *quite irrespective of whether the specific practices have yet been denounced in common law cases.*" Most of the common law of unfair competition developed out of the practice of protecting trade marks and trade names from unscrupulous competitors who attempted to palm off their goods as those of the well established brand.[22] It has gradually broadened, however, so as to include almost all cases where one's business is harmed by the improper acts of a competitor.[23] Although the common law has thereby shown a happy degree of elasticity and adaptability to modern needs, yet courts in many cases while condemning the wrongful conduct of the defendant have felt themselves powerless to give relief under the common law.[24] The Federal Trade Commission has assumed jurisdiction in precisely such cases and its orders forbidding practices which the courts acting under the common law had refused to enjoined have been sustained.[25] Such authority as we so far have leads the writer to conclude that the Commission while following the general principles of the common law of unfair competition, may apply those principles to new situations as they develop even though the specific situation has never been condemned by a common law court. It should be noted that the basis of denying an injunction in many common law cases is not that the defendant's acts are not illegal, but that the plaintiff has not shown an affirmative right to equitable protection. Moreover, equity may deny an injunction through the exercise of a sound discretion (i.e., balancing conveniences, etc.) rather than because of any common law limitation on its jurisdiction. It is submitted that the difference between the common law limits of unfair competition and those which the Commission will find it desirable to set for itself is much less than one would at first imagine, since we are apt to overlook the surprising adaptability of this branch of the common law to new situations and modern needs.

In determining whether the jurisdiction of the Commission should be extended or restricted, courts should take into consideration the relative efficiency of the Commission and the courts in the regulation of unfair competition. The Commission being composed of economic as well as legal experts is better able to handle the statistical and economic problems involved in the application of the law to the facts of particular cases.[26] The broad visitorial powers granted by the statute permit of a most thorough investigation of the facts, while the simplified rules of procedure adopted by the Commission result in a more rapid and less expensive determination of cases.[27] Moreover, the repeated consideration of the same or similar problems develops in the commissioners a degree of expertness in this field which the judge by virtue of his more diversified activities can seldom attain. The statute by making the Commission the plaintiff not only protects the small business man who could not afford the expense of an action to enjoin the unfair methods of large competitors, but also prevents the deception of the public where no one person is sufficiently injured to cause him to undertake the burden of carrying on an action at law. On the other hand, that the Commission is made the plaintiff or prosecutor of infractions of the Act as well as the judge of whether the defendant's acts constitute unfair competition, creates a dangerous situation. Where the same body acts as both prosecutor and judge there is apt to be little of a judicial attitude of impartiality.

The procedure within the Commission seeks to separate these antagonistic functions. To illustrate this separation let us follow a typical case through the Commission.[28] The Commission is informed, usually by way of a letter from a competitor that A is using unfair methods of competition. The letter is forwarded to the Chief Examiner's office where through an Investigational Examiner a preliminary investigation of the facts is made. The report of this investigation comes before a Board of Review, composed of two lawyers and one economist, which determines whether further proceedings are desirable. From the findings of fact and synopsis of law prepared by the Board of Review, the commissioners decide whether a complaint should issue. If a complaint is to issue, the record is transferred to the Chief Counsel's office where a formal complaint is prepared and served on the respondent. Testimony is

20. See Curtis Pub. Co. v. Federal Trade Comm. (C.C.A. 1921) 270 Fed. 881, 909.

21. See Kinney-Rome Co. v. Federal Trade Comm. (C.C.A. 1921) 275 Fed. 665, 667-8 (Italics ours). For a criticism of the apparent inconsistency of this statement, see (1919) 88 Central Law Journ. 425, 426.

22. See M. C. Peters Mill Co. v. International Sug. Feed Co. (1919) 262 Fed. 336, 340; see Index Digest of Vols. 1-3 of Decisions of the F. T. C. (1922) 193-201.

23. International News Serv. v Asso. Press (1918) 248 U. S. 215, 39 Sup. Ct. 68 (defendant enjoined from sending its subscribers as its own news matter first issued by the plaintiff). Aunt Jemima Mills Co. v. Rigney & Co. (C.C.A. 1917) 247 Fed. 407 (injunction issued against using plaintiff's pancake flour trade mark on defendant's pancake syrup, although the plaintiff made no syrup. See (1920) 20 Columbia Law Rev. 228; see C. G. Haines, Efforts to Define Unfair Competition (1919) 29 Yale Law Journ. 1, esp. pp. 6-10, 20-22.

24. Armstrong Cork Co. v. Ringwalt Linoleum Works (D.C. 1916) 235 Fed. 458 (injunction against advertising imitation linoleum as real linoleum refused since there was no attempt to deceive the public by saying that the defendant's goods are those of the plaintiff). In 240 Fed. 1022 this case was reversed by the Circuit Court of Appeals without opinion as to its merits and sent back to the District Court on the ground that its far-reaching commercial significance required a decision after investigation of the facts rather than on demurrer; the court suggested recourse to the Federal Trade Commission. The Federal Trade Commission issued an order forbidding this practice. Federal Trade Comm. v. Ringwalt Linoleum Works (1919) 1 F. T. C. Dec. 426. New York & R. Cement Co. v. Coplay Cement Co. (C. C. 1899) 44 Fed. 277 (injunction against false statement of place of manufacture refused because plaintiff only one of a group manufacturing at that place).

25. Cf. cases cited supra, footnote 24 with the decisions cited in footnotes 11, 12, and 13, supra, where similar practices were held to be within the jurisdiction of the Commission. But cf. Curtis Pub. Co. v. Federal Trade Comm., supra footnote 20.

26. See Rules of Practice before the Commission, 4 F. T. C. Dec. Appendix III, p. 631-7; Haines, op. cit., pp. 23-5; Stevens, Advantages of an Administrative Body in Preventing Unfair Competition (1919) 82 Annals of the Am. Acad. of Pol. & Soc. Sci. 231.

27. See Holliday, The Federal Trade Commission (1922) 8 Amer. Bar Ass'n 293-5.

28. See Mechem, Procedure and Practice before the Federal Trade Comm. (1922) 21 Michigan Law Rev. 125-140.

taken before a member of the Chief Examiner's staff who presides very much like a master in chancery, while a member of the Chief Counsel's staff serves as prosecutor. The complete record together with the respondent's brief is submitted to the commissioners who also listen to oral argument. A majority vote of the commissioners determine whether an order to cease and desist shall issue. Thus it will be seen that the same individual or department is never both prosecutor and judge and that the commissioners themselves serve only as judges leaving the prosecution to the attorneys of the Chief Counsel's staff.

In our effort to prevent unfair competition in trade, it is submitted that the use of an administrative body, such as the Federal Trade Commission, is so superior to the common law method of an action by the injured competitor for damages or for an injunction that the courts, in construing the statute, should extend rather than limit the jurisdiction conferred thereunder.

It is submitted that the jurisdiction of the Federal Trade Commission extends not only to practices tending towards the creation of a monopoly or the undue restraint of trade, but also to those which are merely otherwise injurious to competitors and to the public, where the Commission in the reasonable exercise of its discretion determines that a proceeding is to the public interest, even though the practice involved has not yet been forbidden in any common law case.

HAROLD P. SELIGSON.
Columbia Law School.

AN AMERICAN LAWYER IN THE PRIVY COUNCIL

Contrast in Methods of Highest Courts of British Empire and United States—In Judicial Committee of Privy Council Ceremony Is Largely Eliminated and Procedure Reduced to Greatest Possible Simplicity

By HON. JAMES M. BECK
Solicitor General of the United States

ONE of the most famous streets in the world is Downing treet, London. Only a block in length, little more than an alley and a blind alley at that, its western end is an unassuming brick mansion, known all over the world as "No. 10." It is the "White House" of the British Empire. There its true ruler, the Prime Minister—for the King reigns, but does not rule—has his residence, and within those walls, the British Cabinet determines the destinies of one of the greatest empires of all time.

At the eastern end of the street, and not far from No. 10, is an equally unassuming building, which the casual observer might regard as the main office of a small insurance company. Entering the doorway and ascending a flight of stone steps, the visitor pushes open a swinging green baize door, and suddenly finds himself in a very simple and unpretentious room about thirty feet square. Its walls are of panelled oak, and about its only furniture, except some benches, is a long table. The only decorations are a few portraits of former Lord Chancellors. If the visitor happened to be in that room on almost any Monday, Tuesday, Thursday or Friday from November 1st to August 1st, he would see five unassuming gentlemen in business attire sitting behind the table.

In front, in a small, square enclosure, are about a dozen bewigged barristers, seated like schoolboys on several rows of wooden benches, and, along the simple, panelled wainscoting of the wall, another bench gives scant sitting room to the public. Few ever attend, and the first impression is that a minor committee of a Board of Trade is in session.

The casual visitor would be surprised to know that he is attending a session of one of the greatest courts in the world—the Supreme Court of the British Empire, which, in the scope of its jurisdiction and the breadth of its power, has, as its only rival, the Supreme Court of the United States. It is the Judicial Committee of the Privy Council, and its function is to consider the appeals that are addressed from all parts of the British Empire to the King as the nominal fountain of justice. In this little court room, the legal rights of at least one-fourth of the entire population of the globe may be determined.

Last summer, Uncle Sam appeared as a litigant in this court. He claimed to be the owner of a manufacturing plant at Brantwood, Ontario, erected in 1918 under a war contract with a Canadian corporation, to furnish shells for the armies of the United States. Uncle Sam's title was disputed, and the Canadian company attempted, in 1919, to take forcible possession of the plant and to eject the officers of the United States Army, then in possession.

The United States brought suit in the courts of Ontario to recover possession, and the court of first instance sustained the title of the United States. The appellate court of Ontario, however, reversed this decision and attempted to dispossess Uncle Sam and, while the United States could have appealed to the highest court of the Dominion of Canada, it determined to take its appeal for redress direct to the "King in Council"—and this meant an appeal to the Judicial Committee of the Privy Council, upon whose advice as to the legal merits of the controversy, King George was obliged to act.

It was my great privilege last July to argue this case for the United States, and this unique experience prompts me to contrast the methods of the highest court of the British Empire with those of the highest court of that other great federated Commonwealth—the United States. Each court is the final conscience of a great empire in constitutional morality. Each is the balance wheel of a federated system; for, as the United States Supreme Court by its decisions compels both the Nation and the States to move in their respective orbits, similarly the Judicial Committee of the

Privy Council co-ordinates that world-wide commonwealth of nations, the British Empire.

The authority of each court extends around the world and controls the political destinies and legal rights of hundreds of millions of men. The jurisdiction of the Privy Council extends over the far-flung dominions of a world-wide Empire; while the power of our Supreme Court extends from Maine to Alaska, thence to the most remote island of the Philippines and thus affects the destinies of 120,000,000 people. Together, these two courts at times control, by their decisions, the rights of life and property of at least one-third of the human race. Each court is called upon to interpret widely differing systems of law. Thus our Supreme Court decides questions of French law in Louisiana, of Spanish law in the Philippines and Porto Rico; while the more varied jurisdiction of the Privy Council includes questions of French law in Quebec, Roman-Dutch law in South Africa, Hindu, Mohammedan and Buddhist laws in India and Egypt, and the English common law in New Zealand and other purely English dependencies. Australia, the most self-governing of the British dominions, has manifested its wish for almost complete independence by withholding the right of appeal from its highest courts to the Privy Council. The new Irish Constitution seems to leave such right of appeal in doubt and the jurisdictional question remains to be determined.

Remembering the English love of form and ceremony, one would naturally expect that the court of the Privy Council would be, to the outward eye, one of the most imposing courts of the world. The very reverse is true. Of all courts that I have seen, it is the simplest in form and procedure. It is the only English court where ceremony is largely eliminated and procedure reduced to the greatest possible simplicity. It demonstrates that empty ceremonial is not essential either to dignity or power.

The Lord Justices who constitute the so-called "Board"—too often they are bored—come in ordinary and unconventional street dress. While neither the court room nor the judges suggest the august character of the tribunal, yet the lawyers are expected to observe all the ceremonial dress of the English barrister. The lawyers wear gowns and wigs, according to their several stations as Junior or King's Counsel. Another unusual feature is that, when the Court convenes, the Bar is not in attendance in the court room to await the entry of the Justices. The Bar, solicitors, litigants and spectators may not enter the court room until the Lord Justices are seated and counsel are sent for. When the case is concluded, the audience is dismissed, thus leaving the judges alone in the court room to deliberate upon the arguments and reach a decision. They generally decide the case upon the conclusion of the oral arguments, and, after dismissing counsel, the latter, who await their recall in the barristers' robing room, are summoned back to hear the judgment of the Court, which is announced orally by the presiding judge and is subsequently supplemented by a written opinion.

All this seems very unconventional, as compared with the simple but solemn dignity of the United States Supreme Court.

At the hour when the sessions of the Privy Council begin, counsel await in the robing room the invitation of the Court to enter, and suddenly an officer of the Court enters the barristers' robing room and says a single word. It always sounded to me like "Cancel"; but that was apparently a cockney pronunciation of "Counsel." At once the barristers, solicitors, litigants, representatives of the press and curious spectators scramble into Court, only to find five Justices in most unconventional attire, who are already seated and awaiting their coming.

Without any formality in opening the Court, the pending case is called and the counsel who has the floor proceeds to argue.

In the Privy Council, arguments are largely conversational, and anything that "smells of the lamp" frowned upon. Facing the learned Lord Justices across a narrow table, you are expected, in an easy, conversational tone and in the simplest speech, to tell them what the case is about, to read the pertinent portions of the record, and to cite the precedents that you regard as controlling. The judges follow your explanation with a printed record and from time to time ask the most searching questions.

One great difference between our Supreme Court and the Privy Council arises out of different conditions and necessities. In the Privy Council, unlimited time is given to argument. It can afford such luxury; for its calendar is not a big one. In our Supreme Court, where, each year, the Court has a thousand cases on the calendar, a case must be concluded in two hours—although in exceptional cases a small extension is infrequently granted as of grace. As one who has argued in both courts, I am impressed that the one court gives too much time and the other too little. The case that I argued in the Privy Council would have been given, as of right, only two hours in our Supreme Court. In the Privy Council it consumed five days. Two hours would have necessitated a very brief and condensed statement of the essential facts and a clear statement of the legal contentions. For a fuller examination of the case, our Supreme Court would then have depended upon the printed arguments, which lawyers sardonically call "briefs," because they are rarely brief in fact. The function of the oral argument in the Supreme Court is, therefore, simply to suggest the nature of the case, so that the Court can intelligently study at leisure and with great deliberation the carefully prepared printed arguments.

In the Privy Council, there are no "briefs," although there is a printed summary of the essential facts and the legal points involved which is called "the case." The Court, however, prefers to hear the controversy fully on oral argument and, whenever possible, to dispense with any further study of the case. That method has the advantage of great thoroughness and promptness on decision; but to an American lawyer, it seems somewhat prodigal of time. The arguments are at times inordinately prolix and go at unnecessary length into unimportant details. As I heard Lord Justice Atkin say: "English counsel too often speak for an hour without coming within hailing distance of the point of the case."

Our system makes for more effective, but no more thorough arguments. The gift of condensation, the nice judgment in selecting the strongest points, and the ability to make an impression by broadly sketching the outlines of the case are more adapted to develop powerful advocates than the leisurely way in which the English advocate reads for hours the printed pages of the record, which the judges might as advantageously read at their leisure.

However, both systems have their justification; for the American Supreme Court has each year a thousand cases on its calendar, and I doubt that the

Privy Council has one-fourth that number. While the latter court covers, geographically, a wider range of legal questions, yet the questions involved in appeals to the Supreme Court are are generally more difficult and complex and involve greater interests. The method by which the members of the two Courts are selected differs widely. Our justices are named by the President and confirmed by the Senate and sit for life. They are nine in number, and all are expected to sit in every case. In the Privy Council four or five judges are assigned from time to time by the Lord Chancellor. These are selected from a large body of eminent magistrates, including the Lord President of the Privy Council, the Lord Chancellor, the Archbishops of Canterbury and York, the Lord Justices of the Courts of Appeal, the Master of the Rolls, the Chief Justices of the common law courts, and other leading judges including those who occupy high judicial stations in the Dominions and Colonies. A Canadian judge is generally invited to sit in Canadian appeals, an Indian justice in appeals from India.

I will not attempt to explain the mystery of the retention of the wig which the barrister must wear with his gown. I found it difficult to become accustomed to it; for I felt subconsciously that I was sitting in court with a skull cap on, and as I had not yet become sufficiently bald to qualify for a skull cap, the wig was a subconscious annoyance to me. Nevertheless, I thought it a fine idea that the Bar should, in some way, manifest the great fact that the administration of law was something more than a trade or business. When the lawyer puts on his gown and enters the Court, he thus acclaims himself a minister of justice and as such he differs in degree, but not in kind, from the judges on the Bench. England's retention of the wig can only be explained by her inordinate tenacity to ancient customs, although this custom dates from the time of Charles II. For England this is recent. The wig has no meaning; although it does serve tonsorially to place the baldheaded man and the man with the Samson-like flowing locks on an equality before the Court. Former Senator Lewis' only advantage in the Privy Council would be in the famous "pink whiskers," and not in his flowing locks.

My own experience in the Privy Council was as unique as it was delightful. Nothing could exceed the consideration which was shown me when I argued for the United States Government. The occasion was unique; for it was the first time that any law officer of the United States Government ever appeared in the highest court of the British Empire.

The result was most gratifying; for the Court sustained the contentions of the United States Government and gave it full redress. I never doubted this result; for I had a strong case, and even-handed justice, which knows no race, creed or nationality, is the oldest and noblest tradition of our English speaking race.

President Saner Announces Membership of Naturalization Cmmittee

PRESIDENT R. E. L. SANER, chairman of the Citizenship Committee, has announced the appointment of a Committee on Naturalization, pursuant to the following resolution adopted by the Association at the Minneapolis meeting:

"RESOLVED, That the American Bar Association authorize and direct its Citizenship Committee to appoint an eminent member of the bar of every court of naturalization in the United States whose duty it will be, in the name of the American Bar Association, to request of and induce each such court to raise the standards of citizenship in naturalization proceedings by requiring, as an indispensable prerequisite to the admission of an alien to citizenship, that he actually possess an acquaintance with and working knowledge of the Declaration of Independence and Constitution of the United States, and have a comprehension of the obligations and responsibilities of citizenship arising from his taking the oath of allegiance."

Benjamin P. Crum, Montgomery, Ala.; Thomas C. McClellan, Montgomery, Ala.; Norvelle R. Leigh, Mobile, Ala.; S. L. Pattee, Tucson, Ariz.; J. H. Carmichael, Little Rock, Ark.; V. M. Miles, Fort Smith, Ark.; Henry G. W. Dinkelspiel, San Francisco, Cal.; O. K. Cushing, San Francisco, Cal.; J. Robert O'Connor, Los Angeles, Cal.; John G. Mott, Los Angeles, Cal.; James H. O'Donnell, Denver, Colo.; Jos. G. Shapiro, Bridgeport, Conn.; Charles F. Curley, Wilmington, Del.

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LAW ENFORCEMENT

II

MORE LAY MISAPPREHENSIONS

For effective Law Enforcement, it is highly desirable that the lay press should not misunderstand the attitude of the lawyer and the judge. Co-ordination of all anti-criminal forces is greatly to be desired and cannot be expected in the absence of mutual respect and confidence. The lawyer cannot ignore just criticism. That which is unjust will usually be found to have originated in misunderstanding, and can be removed by frank and friendly explanation.

Inspired with the hope of a better accord and more effective co-operation in the administration of justice, we continue the discussion of some of the more common lay misapprehensions as evidenced by recent press comment on the report of the committee on law enforcement.

"COMMON SENSE" AND "TECHNICALITIES"

The *Binghamton Press* advises the lawyers:

> "Bring a common sense interpretation founded on common justice instead of the technicalities which at present result only in contempt for all law as now administered."

Common sense is one of the most valuable endowments that a man can have. It is the power to think in straight lines, to brush aside confusing and immaterial considerations and come to the heart of a problem. But it must be joined with knowledge and skill. No editor, no matter how great his intellectual attainments or his literary ability, can conduct a successful newspaper without common sense, but common sense alone without knowledge and experience in the art of gathering news, handling the diverse human elements on his staff, catering to the public taste and the technique of journalism, would not be adequate editorial equipment.

Common sense alone is no less an inadequate guide for the administration of justice. Fixed rules must be established and followed. If this were not so, every judge would follow his own ideas and we would have in the courts a government of men and not of laws.

Take, for instance, the maxim which requires the production of "the best evidence." This rule had its origin in "common sense," but when it had been so far tested out and generally approved as to become a rule, a judge was no longer at liberty to substitute his own ideas for this rule. There may be some who think that a copy of a document could as safely be received in evidence as the original, but his argument that this was common sense, would not entitle it to be received. It could only be received in compliance with the technical rule that secondary evidence was admissible after it was shown that the original was lost, or in the possession of the adverse party, or otherwise unavailable.

It is the judgment of men of experience in all lands that the solemn instrument known as a will should be executed in the presence of disinterested witnesses who should themselves attest it in the presence of the testator. Common sense might devise another method for insuring the carrying out of the wishes and purposes of the testator, but how unnecessary to introduce new methods on the authority of an individual in place of those which have been established by the common consent of generations of men.

Technical rules are a necessity from still a different point of view. The business man uses them more than the lawyer does. In the absence of fixed rules he could not be advised what course was safe for him to take. Two alternatives might seem equally sensible to him or his adviser but there would be no assurance that the judge who should be called on to make the ultimate decision would choose one and reject the other of these, on a "common sense" basis, with great resultant loss to the business man who had to make the first guess. Technical rules therefore make for certainty in the forecasting of business enterprises.

The layman usually means by "technicalities" these long established and beneficent rules, when they seem to come in conflict with his personal views.

While the lawyer and the judge realize

that there must be technical rules and that these must in all appropriate cases be sustained and enforced, the broad-minded student of law appreciates that these rules may be misapplied and that the rule must fit the case. It is this application of a technical rule to a case not within its real scope and purpose that the lawyer seeks to avoid, and this species of technicality is obnoxious to every discriminating judge.

Indeed the judge is the declared enemy of undue technicality. We have never seen a judge resort to technicalities to defeat the ends of justice, but it is not an uncommon thing to have a court lean heavily on technical arguments if necessary to prevent injustice.

Moreover, the injustice of this sweeping criticism against the bench and bar as a whole will be seen by brief consideration to be unfair and unfounded. In every case of any importance there are lawyers on opposite sides. If one takes too technical a position by the misapplication of a rule of law or practice, his opponent will criticise and oppose it and no technicality will go unchallenged if argument can be made against it.

DEFENDING A CLIENT ONE "KNOWS" TO BE GUILTY

The *Cincinnati Post* said:

> "The American Bar Association, seeking the remedy for our world-beating murder rate, might well begin within its own profession. What lawyer has not sat in a court room and watched a cunning colleague, representing a prisoner he knew to be guilty, deliberately trying to throw every possible obstacle into the path of justice?"

Here is an exhibition of a very common misapprehension. Does the writer of the above editorial believe in the maxim that every man is presumed to be innocent of the crime charged against him until his guilt has been established beyond a reasonable doubt by legal and competent evidence to the satisfaction of a jury after a trial in accordance with the orderly forms of law? It has been often declared by the courts that this presumption is intended not to protect the guilty but to prevent, so far as human agencies can, the conviction of an innocent person. If this maxim is applicable in the defense of a prosecution for libel, why is it not applicable to one accused of any other crime? Unless this presumption of innocence is to be abandoned, who can criticise a lawyer for compelling the prosecution to make out its case against the accused by competent evidence beyond a reasonable doubt?

Will the course of justice be improved by making the defendant's lawyer the judge of his client's guilt?

In reply to Boswell's question, "What do you think of supporting a cause which you know to be bad?", Dr. Samuel Johnson, in 1768, replied, "Sir, you do not know it to be good or bad till the judge determines it." Lord Birkenhead in his St. Paul address spoke on this subject from the broad experience of his distinguished career, as follows:

> "When people who are not lawyers ask how can an advocate appear on behalf of a client whom he knows to be guilty, the answer is that no advocate has any business to know that his client is guilty. . . . The robust common sense of Doctor Johnson led him to say the first word and the last word upon this debated topic. He said, 'The advocate is not to usurp the functions of the judge, the advocate is to make himself the mouthpiece of him who is accused.' And if you take the extremest case of all . . . the case where a confession has been made by a prisoner to an advocate . . . It arose once at a critical stage of a great English litigation. I would meet that by saying, 'You are not to be the judge of whether that confession is made under an aberration, under a delusion, in hysteria, you are to put the whole facts of that case before the jury and the judge, and they, not you, are to decide as to the facts that have been proved and the reliability of that which has been admitted.'"

Those who entertain doubts on these questions would profit by reading from the autobiographical letters of Lord Shaw of Dunfermline, in that charming book entitled, "Letters to Isabel," the tenth letter, which is reprinted in the July, 1922, number of the JOURNAL. Lord Shaw there tells how narrowly he escaped the entry of a plea of guilty and an appeal for a light sentence on one who seemed to be certainly guilty of forgery but for whom he secured an acquittal and a complete exoneration. His letter closes with these words:

> "Never have any doubt as to where the advocate's duty lies. . . . is it right for him to defend a man whom he knows to be guilty? The presumption of an advocate even thinking that he knows. I learned my lesson. Let in such presumption and justice might be debauched by cowardice and on coward's terms defeated."

Of course, there is a plain distinction to be drawn between legitimate defense and the presentation of perjured testimony or the resort to trickery. Some there be, unhappily, who have thus profaned the temple of justice and who should be whipped from its sacred precincts with rods.

In the next issue we shall take up the discussion of the simplification of the law and the improvement of the machinery of judicial procedure.

DEPARTMENTAL PRACTICE: ADMISSION OF ATTORNEYS

Question as to Whether It Is Necessary to Be Formally Admitted to Practice Before a Particular Department Invariably Arises at Threshold of Departmental Cases—Review of Requirements in This Regard

By Henry C. Clark
Of the Washington, D. C., Bar

THE travel of lawyers to and from our nation's capital city is continuous. Most of these lawyers come to attend to matters before administrative departments or establishments of the Federal Government, and many there are who from time to time, or at least sometime in their career, make such a trip.

Not infrequently the journey, especially if it be the first, is found from one cause or another to be unavailing. Probably the most frequent cause is the failure to have made in advance a definite engagement with the particular official before whom the matter in hand must come. To do this, of course, requires that this official must first be ascertained, at least by title. If such advance appointment be not arranged, often, by reason of absence from Washington or on account of prior engagements, or by reason of a rule requiring previous arrangement, there is no opportunity to hold a conference, and the result is that the attorney must come again, the next time probably after due appointment.

Sometimes a case seems illusive and difficult to locate before an official with authority to act. For instance, during the late war, the War Department constructed a hospital on rented land at one of the larger training camps. In 1919, Congress turned this hospital over to the Public Health Service. In 1921, the Public Health Service dismantled and removed the hospital and in so doing caused serious damage to the reversion. In April, 1922, the President, by Executive Order, transferred this hospital, along with a number of others, to the United States Veterans' Bureau. The War Department made the contract on which a claim for damages was based. The Public Health Service caused the damage. The files were in the Veterans' Bureau. The Veterans' Bureau disclaimed responsibility since they had not done the damage. The Public Health Service stood on the Executive Order turning the hospital over to the Veterans' Bureau. Recourse was next had to the General Accounting Office, whose duty it is to settle and adjust all claims whatever against the Government of the United States. Upon failure to secure redress from the General Accounting Office, the next step would be suit in the Court of Claims. Such suit could be instituted without first presenting claim through the General Accounting Office.

A good deal is written and said about governmental "red tape." In so complicated and enormous a system as that conducted by the administrative departments, bureaus, commissions and establishments of the Federal Government, "red tape" is unavoidable. Perseverance, good humor and thoroughness will almost invariably cut through the "tape" or lead to the proper official where courteous and efficient treatment will be received. The Court of Claims is always open to receive petitions in proper cases, with the possibility of review by the United States Supreme Court. And Congress by the Constitution cannot close its doors to petitions for a redress of grievances. Each House of Congress has its Committee on Claims.

One question that invariably arises at the threshold in departmental cases is whether it is necessary to be formally admitted to practice before the department in which the case is to be presented. The requirements of the various departments in this regard have not heretofore been collected. A review of these requirements constitutes the special topic of this article.

The departments and establishments of the Federal Government may be classified under two heads: first, those which do not keep a register of attorneys; and second, those which keep a register of attorneys.

I.

Those departments and establishments which do not keep a register of attorneys are:

A. Department of Agriculture.
B. Department of Commerce.
C. Department of Justice.
D. Department of Labor.
E. Department of the Navy.
F. Department of State.
G. War Department.
H. Alien Property Custodian.
I. Civil Service Commission.
J. Employees' Compensation Commission.
K. Federal Trade Commission.
L. Federal Power Commission.
M. Interstate Commerce Commission.
N. United States Tariff Commission.
O. United States Veterans' Bureau.

Any attorney in good standing in the Courts of his own State will be eligible to represent clients before any of the foregoing departments or establishments without filing formal application for admission.

However, there are certain rules and provisions of law which pertain more or less generally to all Federal departments and establishments and which it may be necessary for an attorney to comply with before proceeding with his case.

Section 3478 of the Revised Statutes provides:

> Any person prosecuting claims, either as attorney or on his own account, before any of the departments or bureaus of the United States, shall be required to take the oath of allegiance, and to support the Constitution of the United States, as required of persons in the civil service.

And Section 3479 of the Revised Statutes provides:

> The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer

an oath in the State or district where the same may be administered.

The Act of May 13, 1884 (23 Stat. 22) provides that the oath shall be that prescribed by Section 1757, Revised Statutes, which is as follows:

> I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

It is to be noted that the foregoing statutes relate only to "any person *prosecuting claims*." Applying for a passport, defending a court martial, arguing an unfair practice case or conferring with reference to a quarantine regulation are instances in which attorneys are not *"prosecuting claims,"* within the meaning of these statutes. Therefore, it frequently occurs that an attorney may proceed with the matter in hand without having taken this oath.

Two other statutes should also be noticed. These statutes are likewise limited to *"prosecuting claims."* The first is Section 190, Revised Statutes, which provides:

> It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.

The second, the Act of July 11, 1919 (41 Stat. 131), provides:

> That is shall be unlawful for any person who, as a commissioned officer of the Army, or officer or employee of the United States, has at any time since April 6, 1917, been employed in any bureau of the Government and in such employment been engaged on behalf of the United States in procuring or assisting to procure supplies for the Military Establishment, or who has been engaged in the settlement or adjustment of contracts or agreements for the procurement of supplies for the Military Establishment, within two years next after his discharge or other separation from the service of the Government, to solicit employment in the presentation or to aid or assist for compensation in the prosecution of claims against the United States arising out of any contracts or agreements for the procurement of supplies for said bureau, which were pending or entered into while the said officer or employee was associated therewith. A violation of this provision of this chapter shall be punished by a fine of not more than $10,000 or imprisonment for not more than one year, or both.

A wise precaution as part of the preparation of every case is to secure a power of attorney from the client. In many instances this is required. It may be called for at any time. The right to insist upon satisfactory evidence of the authority of the attorney to represent the person for whom he appears is always reserved.

In securing a power of attorney or an affidavit care must be taken that the Notary before whom the acknowledgment is made or oath taken is not employed as counsel, attorney or agent in the case. Section 558 of the Code of Laws of the District of Columbia contains this prohibition:

> No notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent or in which he may be in any way interested before any of the Departments aforesaid.

The Court of Appeals of the District of Columbia, has held that a notary public appointed in one of the states is not authorized to certify in his official capacity to an instrument filed by him in one of the Government Departments as attorney for the party to whom he administered the oath.[1]

Department of Labor

In the Department of Labor certain regulations have been prescribed, even though this Department keeps no register of attorneys. These regulations are found in Rule 31 of the Department's Rules and Regulations, and are as follows:

> Rule 31. Attorneys and other Representatives. Subdivision 1. Admission to Practice.—It shall be requisite to the admission of attorneys or counsellors to practice before the Department or any Immigration Station that they shall be attorneys in good standing in the courts of the State to which they respectively belong, and any person who desires to appear in behalf of any alien shall be a person of good character and reputation.
>
> Subdivision 2. Appearances.—All appearances must be entered in writing and only one person or firm of record representing the interests of the alien will be recognized. Any attorney or person claiming to represent an alien may be required to show that he is entitled to appear for the alien.
>
> Subdivision 3. Fees.—No attorney or agent or other person shall in any case demand or receive compensation of any character exceeding $25 for appearing in behalf of an alien or aliens constituting one family applying for admission, unless authorized to do so by the Department or officer in charge of Immigration Station.
>
> Subdivision 4. Disbarment.—The Secretary of Labor may suspend or exclude from further practice before the Department or any Immigration Station any person, firm, corporation, or association who shall charge or receive either directly or indirectly, any fee or compensation for his services in excess of the above rate except in the manner herein provided, or who, with intent to defraud, deceives, misleads or threatens any alien or who refuses to comply with the immigration laws and rules.

United States Veterans' Bureau

By the Act of June 12, 1917, (40 Stat. 105) Congress dealt thus harshly with the appearance of attorneys before the Bureau of War Risk Insurance:

> No claim agent or attorney shall be entitled to receive any compensation whatever for services in the collection of claims against the Bureau of War Risk Insurance for death, personal injury, or detention except when proceedings are taken in accordance with section five in a district court of the United States, in which case the judge shall, as a part of his determination and order, settle and determine the amount of compensation not to exceed ten per centum of amount recovered, to be paid by the claimant on behalf of whom such proceedings are instituted to his legal adviser or advisers, and it shall be unlawful for any lawyer or other person acting in that behalf to ask for, contract for, or receive any larger sum than the amount so fixed.

This provision has continued in force since the work of the Bureau of War Risk Insurance was transferred to the United States Veterans' Bureau.

The foregoing instance of specific limitations on the matter of fees are by no means exhaustive. Search should always be made into the law and regulations applicable to the situation, not only before a case is proceeded with but before an agreement is entered into respecting fees. The latest statute of this sort is the Act of Congress of March 4, 1923, amending the Trad-

ing with the Enemy Act, in section 20 (42 Stat. 1515), of which it is provided:

> That no money or other property shall be paid, conveyed, transferred, assigned, or delivered under this Act to any agent, attorney, or representative of any person entitled thereto, unless satisfactory evidence is furnished the President or the court, as the case may be, that the fee of such agent, attorney, or representative for services in connection therewith does not exceed 3 per centum of the value of such money or other property; but nothing in this section shall be construed as fixing such fees at 3 per centum of the value of such money or other property, such 3 per centum being fixed only as the maximum fee that may be allowed or accepted for such services. Any person accepting any fee in excess of such 3 per centum shall, upon conviction thereof, be punished as provided in section 16 here of.[2]

II.

Those departments and establishments which require formal admission in order to practice before them and which keep a register of attorneys so admitted are:

A. Department of the Interior,
B. Post Office Department,
C. Treasury Department,
D. General Accounting Office,
E. United States Patent Office.

Department of the Interior

The regulations of this Department governing the recognition of attorneys spring from Section 5, Act of Congress of July 4, 1884 (23 Stat. 101), which provides:

> That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service and otherwise competent to advise and assist such claimants in the presentation of their claims and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement.

It would not be practicable to set out here the substance of these regulations. They may be procured from the Secretary of the Interior. No form of application is furnished by the Department, but the regulations are explicit with reference to what the application must show, including (in addition to name, age, address, when and where first admitted to practice, last court to which admitted, name of Federal departments or bureaus to which admitted, whether ever disbarred or suspended, name of office or employment held under Federal Government) a certificate from the Clerk of Court or Courts before whom the applicant has been admitted to practice "stating that the applicant is a person of good moral character and in good repute and that he has been and is duly admitted to practice in the court of which he is the Clerk, and that the applicant is at that time an attorney in good standing therein," and also including a certificate "signed by a judge of a Court of Record stating that the applicant is a person of good moral character and in good repute, possessed of the necessary qualifications to enable him to render claimant's valuable service, and otherwise competent to advise and assist claimants in presenting their claims before the Department of the Interior and its bureaus."

Firms of attorneys, as such, will not be permitted to practice before this Department or recognized as having the right to appear before it.

If the applicant is admitted to practice before the Department of the Interior, promptly after receiving notification thereof he will probably receive a further communication from the Bureau of Pensions. Admission to practice before the Department of the Interior includes admission to practice before the Bureau of Pensions, but stringent and detailed regulations have been adopted by the Bureau of Pensions limiting and governing the fees, if any, which may be received for representaton in pension cases. The communication sent out by the Pension Bureau is to bring these laws and regulations sharply to the attention of the attorney. Briefly, no contract for a fee is lawful in such cases, whatever fee is paid being paid through the Bureau.

The Patent Office is a branch of the Department of the Interior, but admission to the Department does not include the right to practice before the Patent Office. This will be referred to below more at length.

Post Office Department

A list of all persons entitled to practice before the Post Office Department is kept in the office of the Postmaster General.

Order No. 547 of the Postmaster General contains the regulations governing the admissions of attorneys to practice before the Post Office Department. This Department furnishes a form of application. There must be attached to the application as exhibits certificates of a clerk of court and of a judge, somewhat similar to those required by the Department of the Interior.

Treasury Department

The most detailed of the regulations governing recognition of attorneys before any of the departments or establishments of the Federal Government are those of the Treasury Department. These regulations are issued pursuant to the authority of the Act of Congress of July 7, 1884 (23 Stat. 258), which provides:

> That the Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department, any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

The Treasury Bar has long been famous and very much larger than that of any other Department. A form of application for admission is furnished and this form must be used. The formal requirements are somewhat less than those of the Interior and Post Office Departments since it is not necessary to furnish a certificate of both a clerk of court and of a judge, one or the other being sufficient. Individuals who practice as partners should apply for enrollment as individuals

and not as partners, but after enrollment, an individual may appear in the name of the partnership.

It is incumbent upon any applicant for admission to the Treasury Bar to be thoroughly familiar with the regulations of the Department. These are supplemented from time to time, two supplements having been issued early this year relating to conduct subsequent to admission, rules relating to contingent fees being thereby promulgated. Under date of August 15, 1923, the Department issued in completely revised form its circular entitled: *Laws and Regulations Governing the Recognition of Attorneys, Agents and Other Persons Representing Claimants and Others Before the Treasury Department and Offices Thereof.*

Admission to practice before the Treasury Department includes the right to practice before the Bureau of Internal Revenue and its subdivision, the Income Tax Unit.

General Accounting Office

The General Accounting Office was created by Act of Congress of June 10, 1921 (42 Stat. 24), and performs, among others, the functions of the former Comptroller of the Treasury. However, the General Accounting Office is an independent establishment and has its own roll of attorneys. The Act creating the Office (section 311-F) provides:

> The Comptroller General shall make such rules and regulations as may be necessary for carrying on the work of the General Accounting Office, including rules and regulations concerning the admission of attorneys to practice before such office.

Among these regulations is the following:

> All those appearing on October 31, 1921, on the Treasury Department roll entitled to practice, shall by virtue thereof be recognized and entitled to practice before the General Accounting Office without formal application for enrollment; but in all other respects these regulations shall be fully applicable to them.

Applications for admission will not be considered unless made on the form furnished by this Office. The regulations in general are similar to those of the Treasury Department, but not quite so full or extensive. However, members of a firm may apply for enrollment either individually or collectively.

U. S. Patent Office

The Rules of Practice of the United States Patent Office contain the following:[3]

> A register of attorneys will be kept in this office, on which will be entered the names of all persons entitled to represent applicants before the Patent Office in the presentation and prosecution of applications for patent. The names of persons in the following classes will, upon their written request, be entered upon this register:
>
> (a) Any attorney at law who is in good standing in any court of record in the United States or any of the States or Territorial Court, duly authenticated under the seal of the court, that he is an attorney in good standing, *and who shall file proof that he is possessed of the legal and technical qualifications enumerated in paragraph (b).*
>
> (b) Any person not an attorney at law who is a citizen or resident of the United States and who shall file proof to the satisfaction of the Commissioner that he is of good moral character and of good repute and possessed of the necessary legal and technical qualifications to enable him to render applicants for patents valuable service and is otherwise competent to advise and assist them in the presentation and prosecution of their applications before the Patent Office.
>
> (c) Any foreign patent attorney not a resident of the United States, who shall file proof to the satisfaction of the Commissioner that he is registered and in good standing before the patent office of the country of which he is a citizen or subject, and is possessed of the qualifications stated in paragraph (b).
>
> (d) Any firm will be registered which shall show that the individual members composing the firm are each and all registered under the provisions of the preceding sections.
>
> (e) The Commissioner may require proof of qualifications other than those specified in paragraph (a) and reserves the right to decline to recognize any attorney, agent, or other person applying for registration under this rule.
>
> (f) Any person or firm not registered and not entitled to be recognized under this rule as an attorney or agent to represent applicants generally may, upon a showing of circumstances which render it necessary or justifiable, be recognized by the Commissioner to prosecute as attorney or agent certain specified application or applications, but this limited recognition shall not extend further than the application or applications named.

It will be noted that a "patent attorney" need not be a lawyer. In the other departments, persons may be admitted to practice as "agents" who are not lawyers, but before the Patent Office such persons are designated "attorneys."

We have been discussing the matter of admissions. Reference, however, will not be out of place to the fact that each of the various departments whose regulations are above referred to has incorporated therein extensive rules governing disbarment or suspension from practice.

The purpose of these admisson requirements and practice regulations is three-fold: (1st) to protect claimants, (2d) to guard against unfounded claims, and (3d) to preserve the dignity and integrity of the bar of the several departments and establishments.

(3) Statutory authority for these rules is found in the Act of Congress of February 18, 1922 (42 Stat. 390), amending section 487 of the Revised Statutes.

[1] Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 31 App. D. C. 498, 503.

[2] The constitutionality of some statutes of this character may be open to question. See the reasoning of the court in the late cases of Capital Trust Co. v. Calhoun, 250 U. S. 208, 63 L. Ed. 942, and Calhoun v. Massie, 253 U. S. 170, 64 L. Ed. 843.

Defectives as Automobile Drivers

"Elsewhere in this issue may be found a discussion of the criminal defective which may have a collateral bearing on the question of automobile accidents. There are in the United States many thousands of persons having a mental age of ten or eleven years. Some of these earn a living as clerks or the like; others are the sons of men in comfortable circumstances. Their deficiencies are not generally noticed; their behavior and conversation passes under the low standard which prevails in most circles, where nothing more than a knowledge of the latest slang and the current batting average of Babe Ruth is required. The deficiency is manifested in a lack of responsibility and an unbalanced emotional nature which reacts abnormally. The defective in the lower level has a positive proclivity to cruelty and destructiveness. In the moron or high class feeble-minded this appears as an irresponsible selfishness wholly indifferent to the rights and welfare of others. How many persons of this class are now habitually driving automobiles? Certainly thousands, and this chiefly in the large cities where the risk of accident is greatest. If every driver arrested for violation of law were examined by a psychological alienist, some definite data could be secured as to how far the appalling death roll of the automobile is due to the fact that any person who can keep out of jail is allowed to operate a powerful and dangerous engine on the public highways. If the results indicated that in a large percentage of the accidents a moron was at the wheel, the means of correction, the requirement of a showing of mental maturity by the Binet-Simon test as a prerequisite to a license to drive a car, would be simple."—*Law Notes, Sept. 1923.*

What to be Thankful for

The Committee on American Citizenship Prepares a Pamphlet Suggesting Ways of Observing Thanksgiving Day

THE Citizenship Committee of the Association, in connection with its service in the education of the people with reference to "establishing and maintaining the Constitution of the United States and the principles and ideals of our Government in the minds and hearts of the people," has added Thanksgiving Day to the days for which special programs were prepared last year. A sixteen-page pamphlet has been prepared containing suggested texts for Thanksgiving addresses and sermons followed by the outline of a suggested address or sermon as appropriate to the observance of this Day. An explanation is first given of the origin and spirit of Thanksgiving Day, and the first Thanksgiving Proclamation, issued by President George Washington in 1789, is given in full as suggestive of matters for thanksgiving and praise that are oftentimes neglected in these modern days.

The Citizenship Committee makes the point that if we look beyond our merely material blessings and below the surface, we will realize that first of all we should be thankful that we have a government which conduces to peace, plenty and prosperity. The following matters for thanksgiving and praise are then taken up seriatim and discussed. The Committee insists that we should be thankful (1) that we belong to a race whose outstanding characteristic is a genius for self-government; (2) for the rare men who launched our American form of government; (3) that our American form of government was fixed by written basic laws in the Constitution of the United States; (4) for the opportunities and duties of American Citizenship. There is appended a poem on the Constitution by Archibald Hopkins and the Citizenship Creed as issued by the Committee is also included.

We feel sure that laymen as well as professional men, whether preachers or lawyers, will find the contents of this pamphlet exceedingly interesting and helpful. In carrying the message contained in these pamphlets to the people as a whole the Committee appeals to the Bar, Public Officials, Churches, Clubs, Civic and Patriotic Societies, and individual citizenship generally, and makes in the Foreword a special appeal to lawyers, as follows:

"Let us, then, on this Thanksgiving Day, come together as lawyers representing a great Profession, advocating a better and higher citizenship without caste or class, without rank or distinction, without vanity and without selfishness, with our hearts open, pure and undefiled—and let us this day give thanks for the blessings of a wise, just and Constitutional Government that looks upon the poor and the prosperous, the high and the lowly, with the same unfailing protecting care and consideration."

Another pamphlet that has just been issued by the Committee is entitled, "Suggested Contests on Citizenship Subjects for Schools and Colleges." This represents a point of contact that was implied in the striking sentence used in the report of the Committee at San Francisco: *"The Schools of America Must Save America."* The pamphlet suggests how the psychology of contest may be utilized in stimulating citizenship training in the schools, and it outlines various public speaking and essay contests to this end. Particular attention is called to a high school contest in Civic Discussion, which resolves itself into a symposium on the Constitution of the United States. Eight different subjects dealing with various phases of the nature and the development of the Constitution are given for use by teachers of Civics and Government in regular class work; and it is planned to hold a public contest in the discussion of these topics toward the close of the school year. Attorneys in the various cities and towns of the country are asked to co-operate by having their respective high schools arrange for such a public contest, and in this manner to stimulate a study of the United States Constitution in the schools and to have the pupils communicate the results of their studies to the adult members of their community groups in a public contest.

Mid-Winter Meeting of Executive Committee, Sections and Other Committees

President Saner Suggests a General Get-Together Meeting to Discuss Matters of Interest in the Work of the Association

THE mid-winter meeting of the Executive Committee of the Association has been fixed for January 15th at Washington, D. C. This has always been considered a most important meeting, since the work of the Association is by that time well under way and important matters regarding plans and policies must be discussed and determined.

President Saner has conceived the idea of having allied Section and Committee meetings of the Association at the same time and place, provided that appropriations have heretofore been made for such purpose, in the belief that a general get-together assemblage, even though each particular Committee is dealing primarily with its peculiar problems, would afford a desirable opportunity for contact and personal conferences that would redound to the advantage of the work of the Association as a whole.

In a letter on this subject which has been addressed to all Committee Chairmen and the Chairmen of Sections, Mr. Saner calls attention to the highly important part that the various committees must fulfill in the organization and service of the American Bar Association; that the present administration year is a relatively short one due to the fact that the next Annual Meeing must be held about a month earlier than is customary on account of the adjourned meeting to be held in London; and urges active committee work and a counsel of all the officers on plans and policies for the good of the Association.

It is hoped and expected that the mid-year meeting of the Executive Committee, and of all such other Sections and Committees as usually hold mid-winter meetings and can arrange to meet at the same time and place, will be very helpful in giving impetus to the work of the Association that will carry it through the remainder of the year under full sail and reach the port of Actual Results.

DECISIVE BATTLES OF CONSTITUTIONAL LAW

By F. DUMONT SMITH
Of the Hutchinson, Kansas, Bar

IX. IN RE MILLIGAN
(14 Wall. 2)

THE situation of the federal Government during the Civil War was unique in one respect. Throughout the North and particularly in the Border States there was strong sympathy with the South. Many upheld slavery. Many believed that the South had a right to secede and that the North had no right to prevent secession by force of arms. In the Border States sentiment was almost equally divided between the two hostile camps. It resulted that no nation in time of war was ever so permeated with open and secret hostility, with treason and espionage as was the Federal territory. Powerful secret organizations were formed that enrolled men, procured arms, and threatened open insurrection. There was a constant stream of spies crossing the lines with important information. It was apparent that even the departments in Washington, charged with the conduct of the war, were honeycombed with disloyalty. Plans of campaigns were known to the battle leaders of the South almost as soon as formed. Many of the tragic incidents of battles like Fredericksburg with its terrible slaughter, were due to advance information of the Federal plans. Foes within were almost as numerous as those without.

Great numbers of the disloyal were arrested by the Military Arm, incarcerated in military prisons and denied a trial in court. Military Tribunals were constituted to try the accused by drum-head court martial without deference to the right of a trial by jury. President Lincoln very early, in effect suspended the writ of habeas corpus, not by a general or open proclamation, but by refusing to surrender the prisoners under the writ.

There was a notable instance in 1861 when Chief Justice Taney sitting at Circuit at Baltimore issued a writ of habeas corpus to the commander of Fort McHenry for the production of one Milleken held there by the Military Arm. The officer acting under the instructions of the President refused to produce his prisoner or make return on the writ. Again a storm of obloquy overwhelmed the aged Chief Justice. Northern papers denounced him as a traitor who deserved to be hung. Five years later in the above case the Supreme Court of the United States approved his action by declaring that in all cases it was the duty of the court, upon proper application, to issue the writ, that neither the President's action nor the Act of March 3, 1863, suspended the issuance of the Writ, but merely excused obedience to it, and Taney was fully justified by this decision.

Of all the rights that the English-speaking people have cherished, none is dearer than this great Writ of Right. That and trial by jury are the two sacred bulwarks of Anglo-Saxon freedom. At a time when the other nations of Europe were prostrate at the foot of thrones stained with every crime, when personal liberty was a phrase unknown to either the Lay or Eclesiastical power, our ancestors had wrested from their monarchs, at the swords' point, these two guaranties of human freedom.

No act of Lincoln's was so bitterly condemned by his opponents in the North, so fiercely denounced as the virtual suspension and denial of this great Writ. It required all of that iron firmness that inhered beneath the great President's kindliness to lay a violating hand upon this sacred ideal. He believed that the time demanded it, that he had a constitutional right for the protection of the very life of the Republic to deal with these offenses with the swiftness that only the Military Arm could employ.

In many localities like Baltimore and Louisville it would have been impossible to secure a jury that would render an unanimous verdict of guilty in such cases, such was the division of public sentiment. Nevertheless, many of Lincoln's warmest supporters doubted his constitutional power to suspend the Writ. They believed that it could only be done by Congress and that congressional action was necessary to the validity of these Military arrests and trials. Accordingly the act of March 3, 1863, authorized the President to suspend the Writ anywhere in the United States, but required that lists of all persons arrested should be delivered to the United States Circuit Courts of the district before the next term in order that indictments might be found against them and trials had in the ordinary course if the courts were open. It provided further, upon the failure of the Grand Jury to indict, that twenty days after the Grand Jury had been discharged, the accused might sue out a Writ of habeas corpus and procure his discharge.

The President in September, 1863, issued a proclamation suspending the Writ generally throughout the United States, but the law was silent as to the Military Tribunals which had been constituted and were trying offenders summarily.

Such was the condition when a Military Tribunal of the district of Indiana under General Hovey, the commander, in November, 1864, arrested Milligan, charged him with treason, with giving aid and comfort to the enemy, with inciting insurrection in Indiana, and other crimes. He was summarily tried and sentenced to be hung on May 19, 1865. On the 10th day of May he sued out a Writ of habeas corpus and upon a hearing the circuit judges being divided, they certified the questions involved to the Supreme Court of the United States.

The case was very ably argued by Attorney General Speed, Stanberry of Ohio whom Johnson appointed to the Supreme bench, but who was not confirmed, and Benjamin F. Butler for the Government; by former Attorney General Jeremiah S. Black, James A. Garfield, later President, and David Dudley Field for the Petitioner.

One of the curious things in the case was the suggestion gravely made by the counsel for the government that the case had become moot. As Milligan was sentenced to be hung on May 19, 1865 (the case was argued in April, 1866), it was to be presumed that the officers charged with his execution had performed their duty and that the Petitioner was very, very dead. The court with equal gravity said that it had no judicial information as to whether Milligan was dead or alive, but it would not presume that the eminent counsel who appeared for the Petitioner would

be there representing a dead man. As a matter of fact, President Johnson had postponed the execution on May 10, 1865, the day the Writ issued and in June commuted his sentence to imprisonment for life. He was discharged under the order of the Supreme Court in April, 1866, immediately brought suit against General Hovey in the State Court and upon removal to the Federal Court recovered nominal damages and disappears from history.

Although the judgment of the Court discharging the Petitioner was rendered in April the opinion of the court was not delivered until December, 1866, by Judge David Davis. Judge Davis had been a Democrat before the war and was serving on the circuit bench in Illinois when appointed to the Supreme Court by Lincoln in 1862. He was a close personal friend of Lincoln, the administrator of his estate and an ardent Union man. He was considerably afflicted by the political bee. He was much opposed to the radical policies of the Republican leaders and very open in expressing his opinion. He was nominated for President in 1872 by the Union Labor party on a Greenback platform, because of his strong support of the Legal Tender Acts. He accepted the nomination formally, but failing to receive the endorsement of the Liberal Republican party, declined to run. In 1877 he was elected to the Senate from Illinois by a combination of Greenbackers and Democrats defeating John A. Logan, and resigned from the bench. He acted in the Senate generally with the Democrats where, upon the death of Garfield and the accession of Arthur, as President of the Senate, he became the acting Vice-President. He was not particularly distinguished for ability or learning. His opinions lacked finish. The best of all of them is his opinion in this case.

The court was unanimously agreed that Milligan should be discharged because he had not been presented or indicted by the Federal Grand Jury under the act of 1863. Davis, Field, Nelson, Grier and Clifford further held that Congress was incompetent under the Constitution to establish Military Tribunals and try persons by Military law except where an actual state of war existed and the courts were closed. To this part of the opinion the Chief Justice Chase, joined by Miller, Swayne and Wayne, dissented. The crux of this dissent was in the then political situation. The radical Republican leaders were fighting President Johnson. While the courts in the South were open and functioning and the state governments were being restored, there was much lawlessness and acts of violence all over the South against the negroes lately emancipated. It was claimed that the operations of the Federal Government were impeded and its authority defied. That the local courts were either powerless to suppress this lawlessness or were in sympathy with it, that in effect in many parts of the South this lawlessness amounted to an insurrection against the authority of the Federal Government which justified Martial Law.

The radical leaders were planning to establish government by Military Commissions throughout the South, to suppress these acts of violence, this general lawlessness. The effect would have been the rule of a large part of our country by Martial Law. The decision of these five judges while practically dictum because it was not necessary to the decision of the case, produced the 15th Amendment. Unable to protect the negro with Federal bayonets the radicals gave him the ballot for self-protection. The effect of this dictum was as profound, as far-reaching in its results as any decision the Supreme Court has ever rendered.

Judge Davis said:

> No graver question was ever considered by this court nor one which more nearly concerns all the rights of the whole people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. . . . The Constituton of the United States is a law for rulers and people equally, in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances.

Again commenting upon the contention of the government, he uses this violent expression, highly characteristic:

> But it is insisted that the safety of the country in time of war demands that this broad claim for Martial Law shall be sustained. If this be true it could be well said that a country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation.

Chief Justice Chase voicing the sentiments of the four dissenting judges, said:

> We concur also in what is said of the writ of habeas corpus and of its suspension with two reservations: (1) That in our judgment when the writ is suspended the Executive is authorized to arrest as well as to detain. (2) That there are cases where the privilege of the writ being suspended, trial and punishment by Military Commission in States where Civil Courts are open may be authorized by Congress as well as arrest and detention.

The Chief Justice said further:

> What we do maintain is it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of Military Tribunals for the trial of crimes and offenses against the discipline or security of the army, or against the public safety. . . . We canont doubt that in such a time of public danger Congress had power under the Constitution to provide for the organization of a Military Commission and for trial by that Commission of persons engaged in this conspiracy. The fact that the Federal Courts were open was regarded by Congress as a sufficient reason for not exercising that power, but the fact could not deprive Congress of the right to exercise it. The courts might be open and undisturbed in the execution of its functions and yet wholly incompetent to avert threatened danger, to punish with adequate promptitude and certainty the guilty conspirators. . . . In times of rebellion and civil war it may often happen indeed that Judges and Marshals will be in active sympathy with the rebels, and courts their most efficient allies.

This voiced the view of the radical leaders in Congress. Upon that view they had determined to erect Military Governments in the southern states, although the "Civil Courts were open."

Generally the opinion with its magnificent defense of human liberty and Anglo-Saxon land-marks was hailed with approval. The dictum of the five which condemned in advance the establishment of Military Tribunals in the South was bitterly criticized by a few. The case has stood as the guide to presidential action and limitation upon presidential powers in time of war. The presidents at such times may suspend the Writ of habeas corpus throughout the United States. While the courts must still issue the Writ the presidential proclamation is an answer to it. But where the courts are open and functioning the accused must be presented for indictment to the next Grand Jury and tried with all the forms of law, including the right to a jury. Only in territory which is actually the theater of war, where the courts are closed, where "inter arma silent leges" may Military commissions try and summarily punish offenses against the government without indictment before a court or trial to a jury.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Current Law Journals

ARE the New York Legislature and Governor Nullifiers and Perjurers? This question is created by the repeal of the Mullan-Gage Statute for the enforcement of prohibition in the state of New York, according to Judge David F. Pugh, and he answers in the affirmative in the Ohio Law Bulletin and Reporter for October 22nd. Judge Pugh argues that "It was not left to the discretion of either Congress or the States to enforce, or not to enforce the prohibition. An imperative obligation to enforce it was imposed upon both; the exercise of the power was enjoined upon Congress and the States by one and the same provision." The author cites from Lincoln's debates with Douglas, and presents a strong argument for his views.

"*'Unfair Methods of Competition' under Federal Trade Commission Act*" is the title of an interesting discussion by Minor Bronaugh in Law Notes for October. The discussion centers around the conflict of opinion between the Trade Commission and the Circuit Court of Appeals, on the question as to the right of the Mennen Company to allow a discount to wholesalers which it denies to co-operative corporations, such as chain drug stores, who are retailers.

Central Law Journal for September 5th reprints an article by the American Bar Association Citizenship Committee on "*Americanism,*" which points out "the dangers that threaten our free institutions" and "the nature and obligations of American citizenship."

Michael Angelo Mussman, of Philadelphia, discusses the question "*Is the Amendment Process Too Difficult?*" in American Law Review for September-October. The same journal also reprints an admirable article, heretofore noted in this column, by Professor W. S. Holdsworth on "*The Modern History of the Doctrine of Consideration.*"

The Canadian Bar Review for September contains several addresses of unusual merit and interest to the profession. The Hon. Mr. Justice Mackenzie discusses "*Cross-Examination*" in an entertaining and at the same time helpful manner; and the addresses by His Honour Sir James Aikins, K. C., LL.D., upon "*Constitutional Development in the English-Speaking World,*" and by Hon. Charles E. Hughes upon "*The Pathway of Peace,*" both of which were delivered before the recent meeting of the Canadian Bar Association, deserve wide reading.

E. F. Albertsworth, Western Reserve University, presents an interesting question in California Law Review for September under the title "*Is there a Legal Cycle?*" He asks, "Are we today in our legal reforms more advanced than our ancestors?" After "a comparison of current legal progress and reform in Anglo-American law with similar developments in the Roman law throughout its long history as the law of the civilized world," he concludes that "the survey thus undertaken reveals but little advance over the past legal order, so far as its basic principles are concerned," and that "in the field of social and legal relationships it cannot be denied that we have repeated largely a cycle of certain legal doctrines and institutions worked out by the experience of the past." He finds, however, "no occasion for alarm" in this, and suggests that "it might be equally comforting to legal reformers to know that the common law may eventually or perhaps inevitably, reach the goal of law reform on a cycle theory, as it is at present confidently believed it will obtain a similar result through the efficacy of human effort, on an evolutionary hypothesis."

Walter E. Barton, of the Washington, D. C., Bar, throws light on the questions "(1) When is a corporation entitled to special assessment?" and "(2) What is the measure of the relief granted by special assessment?" under the title "*Special Assessment Under the Revenue Acts of 1918 and 1921*" in Central Law Journal for October 5th.

Virginia Law Register for August contains two articles worthy of note. In the article "*Res Adjudicata: Who Entitled to Plead,*" Berkeley Cox, of Richmond, Virginia, analyzes and classifies the cases in which the plea *res adjudicata* may be made by one who was himself not a party to the previous suit. Under the title "*Retroactive Taxation,*" T. W. D. Duke of New York, discusses the constitutionality of the legislation, which it is contemplated will result from the vigorous efforts which "will be made during the next session of Congress to pass laws designed to obtruncate accumulated corporate surpluses." "Despite the disadvantages and positive perils incident to the levy of retroactive taxation as proposed." Mr. Duke finds no constitutional objection to such legislation, but trusts that Congress, upon which "rests the burden of protecting the interests of the country as a whole," will eliminate from the legislative program "unreasonable retroactive taxation, which would go far toward overthrowing our industrial prosperity."

An emphatic, and well reasoned protest against "*Federal Encroachments Upon State Sovereignty,*" in which the author, Edward P. Buford, makes a real contribution to the increasing body of literature upon the subject, appears in Virginia Law Register for September. In the October issue of the same journal, Edward James Woodhouse, under the title "*Law and Legal History in a Democracy,*" deplores the decline of American interest in politics and of the quality of American political thought; points out that lawyers to whose care Law, "the great

nerve system of the body politic" has been committed "wholly and blindly" have "sold their birthright for a mess of pottage," changed their profession into one of the most commercial of businesses," and have "failed miserably even to maintain, much less to extend and strengthen, the sense of public responsibility, of professional *noblesse oblige* that dominated the legal profession in the last part of the Eighteenth Century and the early part of the Nineteenth," and suggests that a thorough historical study of the law should be made available to the highest possible number of citizens, laymen as well as lawyers, by inclusion in the liberal arts curricula of all colleges. "Only thus," he concludes, "can any system of law be made a real instrument of democratic government." The article has much of real merit, contains many constructive ideas, and is worthy of wide reading and thoughtful consideration by the profession.

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II. Among Recent Books

THE Constitution of Canada: An Introduction to Its Development and Law. By W. P. Kennedy. Oxford University Press, American Branch, New York, 1922, pp. XX, 519. Not many years ago the history and government of the Dominion of Canada was scantily considered and little appreciated in the United States. This was for some time accounted for in part by a scarcity of brief and readable treatises on Canadian history and government. Such condition no longer prevails for the nature and development of the Dominion government have been analyzed from different viewpoints by numerous writers. For a brief and interesting account of the development of the Canadian government with a short analysis of the existing system the above volume by Professor Kennedy takes first rank. The author's purpose in presenting Canada's contributions in the realm of political experience which constitute "a decisive challenge to the absolute Austinian doctrine of sovereignty" has been carried out with unusual acumen and with rare insight into the modern problems of political power and sovereignty. It is impossible in a brief review to give an adequate idea of the discriminative scholarship and insight into the modern problems of the British Colonial Empire which is constantly in evidence throughout the volume.

Professor Kennedy traces in short summaries the constitutional development of Canada from the early settlements to the marked changes in status which have resulted from the World War. No writer has given a clearer analysis of the conflicts and political policies involved in the gradual adoption of responsible government in Canada. Joseph Howe's letters in answer to Lord Russell, Lord Durham's recommendations relative to self-government, and the policies of colonial governors from Lord Sydenham to the adoption of responsible government are carefully evaluated in the emergence of the idea of colonial home rule. Similiarly, the beginnings of federation are traced in the constructive work of Galt, J. A. MacDonald, and Brown until the emergence of the two ideas of federalism and responsible government in the British North America Act of 1867, "a document which was chiefly the product of Canadian statesmanship."

Most significant, however, is the suggestive account of the development under the British North America Act of a relatively new concept in the realm of government, an "autonomous nation in an imperial commonwealth." The author emphasises the fact that Canada is for most purposes an independent nation, but observes that despite the "continuous shedding of imperial control" Canada from an international standpoint cannot enter into independent political agreements and is not therefore a sovereign state. The developments during and since the war give Canada a national and international status which is sure to lead in the direction of greater freedom of action for Canada, but altogether the imperial bonds are thought to be strengthened rather than weakened. Some of the misconceptions common in the United States and England as to the nature of Canadian federalism are corrected. This is particularly true as to the error involved in the rather common statement that in the federal system of Canada "residuary powers" rest with the Dominion government whereas, in fact, the Provinces and Dominion have each "residuary powers" within their separate spheres of powers. The right of the Dominion to legislate for the peace and good order of Canada is shown to involve only a restricted field in which reserve powers of legislation may be exercised by the central government.

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Marriage and Nationality

"The Jubilee Meeting of the International Law Association (it was founded in 1873), held in Lincoln's Inn last week, was marred by the tragic death, on the day of its opening, of the world-renowned jurist, Dr. Zeballos, President of the Association, who was to have opened a discussion on 'Nationality and Naturalisation.' An important branch of the same subject—the effect of marriage upon nationality—was developed by Dr. Ernest Schuster in a learned paper dealing with the conflicts of law in different countries arising from the rule of woman's tutelage to her husband, adopted by the Code Napoleon from the old Roman Law. Under the influence of that example of the early part of the nineteenth century, many of the States which have grown up since, particularly in South and Central America, have adopted the rule—new, in Western countries, at least, up to that time—that a woman, on her marriage with a citizen of another country, definitely lost her original nationality, and acquired the nationality of her husband. It was not so in England, which maintained the common law rule that a female British subject retained her nationality though married to a foreigner; and this remained the law until the passing of the Naturalization Act, 1870, when the position of the wife as regards nationality status was assimilated to that of her husband in all respects. The increasing recognition of women's political rights has induced a change of view as to the propriety of this modern legislation, and a reversion to the old common law rule, accompanied by its general adoption in other countries, is now advocated in many quarters."—*The Law Journal. Oct. 13.*

REPEAL OF PENAL STATUTES AND EFFECT ON PENDING PROSECUTIONS

Existing Rule Apparently Based on Continued and Thoughtless Acceptance of an Unsupported Statement by Hale in His Pleas of the Crown and on Outworn Theory That Function of Criminal Law Is Purely Punitive

By Albert Levitt

IT is familiar law that "the repeal of a statute pending a prosecution thereunder without any saving clause as to such prosecution will prevent its being further prosecuted, and this applies as well after judgment and sentence pending an appeal duly taken therefrom as before the final determination in the trial court." In these words Hoyt, C. J., laid down the law in State v. Allen.[1] Similar language was used by Judge Arnold, of Mississippi, who said: "The proposition is too plain to admit of discussion, that, after the repeal of a law, no penalty can be enforced nor punishment inflicted for a violation of its provisions, committed while it was in operation, unless provision be made for that purpose."[2] In 1921, Woods, Circuit Judge for the Fourth Circuit, announced: "The general rule is that the unqualified repeal of a criminal statute expresses the legislative will that the acts which were offenses under it, done while the statute was in force, shall no longer be regarded as criminal; and shall not be punished under the repealed statute."[3] Fifty years earlier, Lord Campbell, C.J., in the leading English case of Regina v. Denton,[4] declared; "The general rule is that a statute from the time that it is repealed cannot be acted upon"; and Earle, J., in his concurring opinion said: "To say that proceedings can nevertheless be followed up contravenes the sense of the word repeal. . . .The repeal takes away the ground and makes the indictment bad in substance as well as in form." This is still good law in England today.[4a]

It would seem then that the repeal of a statute completely destroys the possibility of continuing any prosecutions which were pending at the time the statute upon which the prosecutions were founded is repealed, unless there is a saving clause within the repealing statute, or in another statute which controls generally the effect of repealing statutes upon pending prosecutions.[5] But, in spite of the assertion that "the proposition is too plain to admit of discussion," it is submitted that the reasons why the law is as it appears to be are not obvious. A careful reading of all the cases which the writer has been able to find after diligent search (though it seems likely there may be other cases) does not reveal any adequate reason why the law should be as it is or should so remain. The writer ventures to believe that the existing rule is based upon the continued, thoughtless acceptance of an unsupported statement made by Hale, in his Pleas of the Crown, and upon an outworn theory that the function of the criminal law is purely and solely punitive and vengeful. The thesis presented in this article is that the repeal of a statute should have no effect whatever upon pending prosecutions founded upon the provisions of the repealed statute.

I.

The earliest statement of the existing rule that the writer has discovered is that in Hale's Pleas of the Crown.[6] Hale is speaking of the statute dealing with treason enacted in the time of Edward VI.[7] The eleventh section of the act Hale presents as follows:

> The 11" clause declares, that no person already arrested or imprisoned indicted or convicted, or outlawed for treason, petty treason or misprision of treason, shall have any advantage of this act.

In commenting on this section Hale Says:

> It is also observable upon the 11" clause, that when an offense is made treason or felony by an act of Parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereon are discharged by such repeal, and cannot be proceeded upon after such repeal, unless a special clause in the act of repeal be made enabling

[1] State v. Allen, 44 Pac. 121 (1896).
[2] Wheeler v. State, 1 S. (Miss.) 632 (1887).
[3] Vincenti v. U. S. 272 Fed. 114 (1921).
[4] 18 Q. B. D. 761; 118 Reprint 287 (1852).
[4a] (1916) 1 K. B. 688, Watson v. Winch.
[5] For cases dealing with saving clause in the repealing statute see: 1 Hale, Pleas of the Crown, 291 (1680); Wall v. State, 70 Am. Dec. 302 (1857); Teague v. State, 39 Miss. 516 (1860); Josephine v. State, 39 Miss. 613 (1861).

The following cases deal with a saving ordinance or statute: Birmingham v. Baranco, 58 S. (Ala. App.) 944 (1912); Ex Parte Lamar, 274 Fed. 160 (1921); Vincenti v. U. S., 272 Fed. 114 (1921).

The following are the cases dealing with this rule of law, which the writer has been able to find, arranged in chronological order: 1680. 1 Hale, P. C. 291. 1764. Millers Case, W. Blackstone 451; 96 Rep. 259. 1787. 1 Hawkins, P. C. c. 40 pr. 6. 1838. Reg. v. Mawgan, 8 A. & E. 496; 112 Reprint 927. 1849. Reg. v. Swan, 4 Cox. C. C. 108. 1852. Regina v. Denton, 18 Q. B. D. 761; 118 Reprint 287. 1858. Mitchell v. Brown, 1 E. and E. 267, 274; 120 Reprint 909. 1801. U. S. v. Schooner Peggy, 1 Cranch. 103. 1803. Anonymous, 1 F. Cas. No. 475. 1804. U. S. v. Passmore, 1 L. ed. 871; 4 Dall. 372. 1809. Com. v. Deane, 1 Binn. 601; 2 Am. D. 497. 1809. Yeaton v. U. S., 5 Cranch 281. 1823. Atoo v. Corn, 2 Va. Co. (4 Va.) 382. 1831. Commonwealth v. Marshall, 11 Pick. 350; 22 Am. D. 377. 1834. Commonwealth v. Welch, 2 Dana (Ky.) 330. 1838. State v. Johnson, 12 La. 547. 1844. Taylor v. State, 7 Blackf. (Ind.) 93. 1846. Mayers v. State, 7 Ark. 68. 1848. State v. Allaire, 14 Ala. 435. 1850. Commonwealth v. Herrick, 6 Cush. (Mass.) 465. 1851. State v. Lloyd, 2 Ind. 659. 1853. Com. v. Pattee, 12 Cush. (Mass.) 501; Heald v. State, 36 Me. 62. 1854. Howard v. State, 5 Ind. 183. 1857. Wall v. State, 70 Am. Dec. 302; Lumming v. State, 9 Ind. 309; State v. King, 12 La. Am. 593. 1858. Genkenger v. Com., 32 Pa. 99; State v. Henderson, 13 La. Am. 489; State v. O'Connor, 13 La. Am. 486. 1860. Teague v. State, 39 Miss. 516; Hasting v. People, 22 N. Y. 95. 1861. Josephine v. State, 39 Miss. 613. 1864. State v. Ingersoll, 17 Wis. 651. 1865. Griffin v. State, 39 Ala. 541. 1866. Flaherty v. Thomas, 12 Allen 428; Commonwealth v. McDonough, 13 Allen 581. 1867. Aaron v. State, 40 Ala. 307. 1868. Exparte McCordle, 7 Wall. 506; Carlisle v. State, 42 Ala. 523. 1869. U. S. v. Findley, 25 F. Cas. No. 15099. 1870. State v. Brewer, 22 La. Am. 273. 1871. Sturges v. Spofford, 45 N. Y. 446; U. S. v. Tynen, 11 Wall 88, 20 L. Ed. 153. 1873. Whitehurst v. State, 43 Ind. 473; Mullinix v. State, 43 Ind. 511. 1875. Powell v. People, 5 Hun. 169. 1876. Sheppard v. State, 28 AM. R. 422. 1878. Halfin v. State, 5 Tex. A. 212; State v. Campbell, 44 Wis. 529; Kansas City v. Clark, 68 Mo. 588. 1879. Comm. v. Hoke, 14 Bush. (Ky.) 668; Speckert v. Louisville, 78 Ky. 287. 1880. People v. Tisdale, 57 Cal. 104; Day v. Clinton, 6 Ill. A. 476. 1882. Higgenbotham v. State, 19 Fla. 557. 1884. Mulkey v. State, 16 Tex. A. 53. 1887. Wheeler v. State, 1 S. (Miss.) 632; State v. Williams, 2 S. E. 55. 1893. People v. Meakin, 21 N. Y. S. 1103. 1895. Mahoney v. State, 42 P. 13 (Wyo.), 1896. State v. Allen, 44 P. 131. 1897. People v. Hiller, 71 N. W. (Mich.) 630. 1898. State v. Mansel, 30 S. E. 481. 1899. State v. Lewis, 33 S. E. 351. 1903. Pensacola Ry. Co. v. State, 33 So. (Fla.) 985. 1904. In re Kline, 70 N. E. 511. 1910. People v. Schoenberg, 125 N. W. (Mich.) 779. 1911. State v. Guillory, 127 La. 951, 54 S. 297. 1912. American Fork City v. Nicholas, 125 P. 395; Benningham v. Baranco, 4 Ala. A. 279; 58 S. 944; Pleasant Grove City v. Lindsey, 125 P. 389. 1913. State v. Ashley, 86 A. 308. 1917. Ex parte Wright, 199 S. W. 486. 1918. State v. District Court, 169 P. (Mont.) 1180; Salina City v. Lewis, 172 P. 286; Salina City v. Melsey, 172 P. 290. 1921. Page v. State, 230 S. W. 161; State v. Thomas, 89 So. 887 (La.); Vincenti v. U. S., 272 Fed. 114; Exparte Lamar, 274 Fed. 160.

[6] Page 291.
[7] 1 Ed. VI. Cap. 12.
[8] Pleas of the Crown, page 289.

such proceedings after the repeal for offenses committed before the repeal as there is in this case.[9]

But Hale cites no authority for this statement. Diligent search has failed to discover a single case before 1680 which would support Hale's remark. Nor has any other authority been found prior to 1764, over a century after Hale wrote his treatise. In this year was decided Miller's Case.[10] One Miller was forced into involuntary bankruptcy under an insolvent debtor's act, and went through the process of swearing to his schedule after giving up all his effects. The court adjourned giving him his discharge until the next term of court. During this vacation the clause in the bankruptcy act compelling the granting of a discharge was repealed. There was a motion made to compel the issuing of the discharge as jurisdiction had attached before the clause was repealed. But the court decided that its jurisdiction was gone and nothing further could be done.

Over twenty years later Hawkins wrote:[11]

> If one commit an offense which is made felony by statute, and the statute be repealed, he cannot be punished as a felon in respect to that statute.[12]

But he does not cite Miller's Case nor any other authority.[13] Fifty years later Rex v. Mawgam[14] was decided and then within a few years followed several decisions, which settled the law for England in this matter.[15] It is to be noted that in all of these cases there is little or no discussion of the point under consideration. The reason advanced for releasing the defendant is that the courts have no power to proceed further in the matter. But no satisfactory reason is given as to why and how the courts are suddenly shorn of their power by the repeal of the previously existing statute.

The earliest United States case which has been found is United States v. Schooner Peggy,[16] decided in 1801. This was an action in the court of Admiralty, which condemned a schooner as a prize. There was an appeal from the decision. Pending the appeal a treaty was negotiated between France and the United States which made provisions for the return of ships captured by both nations. The court held that The Peggy was to be released. It said that a treaty was a part of the supreme law of the land and so had wiped out the power of the court to do anything further in this matter. In 1803 The Anonymous Case[17] was decided; and in the following year the leading case of United States v. Passmore[18] held that the repeal of a statute was an absolute bar to a prosecution for an offense committed against the statute. From that period on it has consistently been affirmed that in one way or another the repeal of a statute without a saving clause has as its result the release or acquittal of any one who is under prosecution for an act committed against a repealed statute.[19]

There is a little more discussion of reasons for such being the law in the American than in the English cases. But no court seems to have thought the matter worthy of a thorough analysis in the light of its history or in regard to its relation to the social needs of the time when the particular decision was handed down. That a rule of such importance to the general welfare should have been accepted without question and without change for two hundred and fifty years is, it is submitted, as remarkable an example of thoughtless judicial *laissez faire* as can be found in the history of the criminal law.

II.

An analysis and comparison of such adjudicated cases as the writer has been able to examine disclose that there are four classes of reasons given by the courts for holding that the repeal of a statute puts an end to pending prosecutions under the repealed statute. These reasons relate to (A) the absence of a law to be enforced by the courts; (B) the absence of an offense to be punished; (C) the release of an offender's guilt; and (D) the absence of power in the court to proceed with the prosecution.

A. Absence of a Law to Be Enforced by the Courts

In the leading case of Hartung v. People,[20] the court said: "It scarcely required an examination of authorities to establish a principle so plain upon reason as that life cannot be taken under color of the law after the only law under which it is authorized to be taken has been abrogated by the law-making power."

In Halfin v. State,[21] the court said, "there is no law now in force in Caldwell County[22] by which persons who may be charged under the act can lawfully be punished."

In Greer v. State,[23] the court held that a prosecution must be dismissed and "this for the obvious reason that no one can be punished except by virtue of a law in force as to the offense in question at the time of the trial of the offender."

The idea seems to be that the law itself is wiped out and so nothing further can be done to prosecute offenses under the previously existing law. The destruction of the law seems to have some magical effect upon the proceedings so that they cannot go on. It is submitted that the reason is not at all an "obvious" one. Nor does the statement of the court that it is obvious make it obvious. One is led to suspect that familiarity with a phrase is mistaken for intellectual apprehension. The court does not have any reason, so it says the reason is obvious. The reasons why the prosecution of a crime is not completed before the repeal of a statute under which the accused is prosecuted are often so unrelated to the passage of the repealing statute that they should not be overlooked when this matter is discussed. The first of these reasons is that criminal proceedure often moves with such abominable slowness that several years may go by between the bringing of an accusation against a person and the final judgment that he is guilty of the offense charged. All kinds of dilatory tactics may be employed by the defendant's attorney. Every technic-

[9] Ibid, page 291.
[10] W. Blackstone, 451; 96 Reprint 259 (1764).
[11] Pleas of the Crown, Ch. 40, Par. 6.
[12] Ib. page 169.
[13] In the margin of the edition which I have at hand there is a reference to "B. Cor. 203" which I have been unable to find. It is probably Brooke's Abridgement. Ch. Corona, which does not seem to be in point.
[14] 8 A. & E. 496; 112 Reprint 927 (1838).
[15] Regina v. Swan, 4 Cox C. C. 108 (1849).
[16] 1 Cranch 103 (1801).
[17] 1 Fed. Cases No. 475 (1803).
[18] 4 Dall. 372; 1 L. Ed. 871 (1804).
[19] See cases in note 5 Supra.
[20] 22 N. Y. 95 (1860).
[21] 5 Texas App. 212 (1878).
[22] There was a provision in the penal code reading "The repeal of a penal law when the repealing statute substitutes no other penalty will be held to exempt from punishment all persons who have offended against the provisions of the repealed law, unless it be otherwise declared in the repealing statute."
[23] 22 Texas 588. This is quoted with approval and is followed by the court in Sheppard v. State, 20 Am. R. 422 (1896); Mulkey v. State, 16 Tex. App. 53 (1884). In the case of The Pensacola Ry. Co. v. The State, 33 So. (Fla.) 985 (1903), the court goes even farther and says: "The repeal of the statute acted to obliterate the statute repealed as completely as if it had never been enacted except for purposes (of previously completed prosecutions). Mahoney v. State, 42 P. (Wyo.) 13 (1905) is to the same effect.

ality of law or procedure may be seized upon and utilized to carry the case to a higher court. Furthermore, if the docket of the higher court is crowded, and it usually is, that condition operates to postpone the emergence of the final judgment. Why then, should the mere passage of time, during which a prosecution cannot go on, plus repeal of the statute, result in having the prosecution outlawed? The statute *was* in force at the time the act was committed; the act *was* criminal at the time it was performed. That is a fact which the repeal of the statute cannot change. The offender is as much deserving of punishment after the repeal of the statute as he was before its repeal[24]. None of the factors that make for his conviction at the time the statute was in force have been eliminated. Of course, if the repealing statute definitely provides that all pending prosecutions shall stop then the courts cannot go on. The legislature is supreme in this matter. But in the absence of such peremptory legislation why should the *courts* stop the prosecution? Why should they read into legislation that which is not there? This is particularly a pertinent question when the repeal is by implication and the implication arises from the fact that the repealing law has imposed a severer penalty for the offense than the repealed statute imposed. How can the courts say that prosecution must stop when the legislature says that the outcome of the prosecution should be a heavier punishment. than before? The courts, of course could not impose the higher punishment. That would be enforcing an ex post facto law. But why can they not go ahead with the prosecution and impose the old penalty?[25] Why should dilatory tactics on the part of the defendant's attorney be permitted to turn the repeal of a law into an automatic ejector from the docket of the case in which the attorney is interested? I submit that this ought not to be so. The courts overlook the importance of the social interest in the general security and the need of society to be protected from destructive acts. Even if the particular law has been destroyed acts dangerous to society have been committed. The consequences of these acts still exist. The prosecution based upon these acts should go on. A phrase two hundred and fifty years old should not be permitted to interfere with the social security demanded by the present day.

B. The Absence of an Offense to Be Punished

So far as the act itself is concerned three ideas seem to animate the courts. These are (I) that the acts cease to exist[26] (II) that the acts are discharged;[27] (III) that the acts lose their criminality.[28]

The first is pure fiction. To say that the repeal of a statute removes from the material universe acts which were completed before the statute was repealed is to say that which is not so. Removing phrases from a statute book does not undo a rape, a burglary, an emembezzlement, or a violation of the "speed laws." At most the second idea might be applicable. It means that the acts cease to be cognizable by the courts when the statute under which they came before the courts is repealed. The acts still exist but they and their consequences are no longer within the purview of the courts and the law. This would be true if the act was committed *after* the law was repealed. Such an act would not be an offense against the law, as there was no law at the time of acting, and so the act could not come within the purview of the courts. There is nothing to bring it before the court, unless the act is a crime at common law, and the particular jurisdiction allowed the existence of common law crimes. But if the act *was* committed *before* the statute was repealed, and particularly if prosecution had begun before the statute was repealed, then the act is already *before* the court and the court has to take notice of the act. For, here too, unless the repealing statute expressly ordered the courts to throw the case before it out of court, the court can, and should, it is submitted, go on and finish the adjudication of the case. It had jurisdiction over the person, the subject matter and the cause of action when the case began; the repealing statute did not expressly take this jurisdiction away; it would increase the feeling of safety of society if the person before the court were definitely stamped as being not a wrongdoer, and society would be protected if, should the person be found to be an offender, the person were placed where he could not harm the social organism. I submit, that these are sound reasons why the court should continue the prosecution and not suspend it.

The third idea seems to be that the act loses its criminal characteristics when the statute which made the act a crime is repealed. In the Anonymous case[29] a federal court held that:

> Every offense for which a man is indicted must be laid against some law and it must be shown to have come within it. Such law may be the general written or common law or the statute law. The offense must not only come within the terms of such law but the law itself must at the time be subsisting. It is a clear rule that if a statute create an offense and it is then repealed no prosecution can be instituted for any offense committed against the statute previous to its repeal. The end of punishment is not only to correct the offender but to deter others from committing like offenses. But if the legislature has ceased to consider the act in the light of an offense those purposes are no longer to be answered and punishment is then unnecessary. . . . . The repeal of those laws (against acts mala in se) places the acts committed under them upon the same ground as they were before the act was passed.[30]

This was said in 1803. Nearly a hundred and twenty years later another federal judge repeated the same idea in more explicit phrases. This was in the

[24] This is true even if the act has not been prohibited for the future. For, a rule of law, whether it originates in statute or in common law, which declares certain conduct criminal, creates legal relations. The primary relation thus created is that of duty—every one is put under a legal duty not to do the forbidden act. If a person does the forbidden act, he violates this duty and thereby creates a new legal relation—namely, liability to punishment. When he is prosecuted the fundamental issues presented to the court for decision are: (1) Was he under a duty not to do the alleged act? (2) Did he do this act? (3) Did he thereby incur liability to punishment? The existence or non-existence of such duty is a fact. No subsequent action by the legislature, such as the passage of repealing statute, can change this fact. It may destroy the duty as to future conduct, but it cannot alter the fact that when the defendant did the act for which he is being prosecuted the duty did exist. Similarly, a repealing statute cannot alter the fact that the defendant did commit the act in question, nor the fact that a new legal relation—liability to punishment—was thereby created. The pfoblem is whether a mere repealing statute, which contains no saving clause, should, by the courts, be given the effect of destroying the defendants liability to punishment or of depriving the court of jurisdiction. Statutory torts are not thus affected. (James v. Oakland Co., (Calif. 1909). 103 P. 1082, 10 Cal. App. 785; Long Sault Dev. Co. v. Kennedy, 105 N. E. 849 (N. Y. 1914); Comm. v. Mortgage Trust Co., 76 A. 5, 227 Pa. 163 (Pa. 1909).) Why should statutory crimes be so affected?

[25] An excellent statement concerning this matter will be found in 20 Michigan Law Review 221.

[26] Howard v. State, 5 Ind. 183 (1854); U. S. v. Findlay, 25 Fed. Cas. No. 15099 (1869); U. S. v. Tynan, 11 Wall. 88; 109 (1871).

[27] U. S. v. Tynan, 11 Wall. 88 (1871); State v. King, 12 La. Ann. 593 (1857); Higginbotham v. State, 19 Fla. 557 (1852); People v. Tisdale, 57 Cal. 104 (1852); Kansas City v. Clark, 68 Mo. 588 (1878); State v. Guillory, 54 S. 297 (1911); Attoo v. Com., 2 Va. Cases (4 Virginia) 382 (1823); Com. v. Deane, 1 Binn. 601 (1809); Speckert v. Louisville, 78 Ky. 287 (1879); Regina v. Denton, 18 Q. B. D. 761; 118 Reprint 287 (1852).

[28] Anonymous, 1 Fed. Cases No. 475 (1803).

[29] Ibid.

[30] The defendant was guilty of perjury in bankruptcy proceedings. Before the prosecution but after the commission of the perjury the statute was repealed. It was held that the prosecution was barred.

case of Vincenti v. The U. S.,[31] in which Woods, J., said, (semble):

> The general rule is that the unqualified repeal of a criminal statute expresses the legislative will that acts which were offenses under it done while the statute was in force, shall no longer be regarded as criminal, and shall not be punished under the repealed statute.

Assuming for the time being that an act is criminal simply because a statute makes it criminal, it is difficult to see how a criminal act can lose its criminality simply because the statute is repealed. At the time the act was done the statute was in existence. The act then was criminal. The act is completed, its nature is fixed. It became fixed at the time the act was committed. Cloaked in criminality the act stalks through the courts, is tried, convicted and sentenced. Final judgment quivers on the end of the judge's tongue. Pending the enunciation of the judgment, the statute is repealed. In the twinkling of an eye the cloak of criminality is whisked off, and the act stands revealed garbed in innocence and purity. Such legal metaphysics is too refined. Murder remains murder even if the statute defining murder and imposing the penalty is repealed by another statute imposing a higher or lower penalty. That which made the act criminal was the injury the act was doing to the social organism of which the actor and the victim of his acts were parts. The statute was simply a statement that this act was an injury to society. The act is not changed nor is the nature of the act changed simply because a legislative body writes some phrases about the act upon a piece of paper. That certain consequences shall befall the actor because of his acts or not the legislature can say. But the act itself is a fact which no amount of writing can change. It does or it does not hurt society. In either case society may or may not wish to inflict punishment upon the actor. But society, or its representative the legislature, cannot wipe out the act. It cannot undo that which is done. It may try to prevent the doing, it may punish that which is done, it may ignore the existent act, but the act remains. It does not cease to exist, it cannot be discharged, it retains its criminality, whether the statute remains upon the books or not.

C. The Release of an Offender's Guilt

Inability to punish the prisoner is given, by some courts, as the reason why the pending prosecution must stop when the statute upon which the prosecution is based, is repealed. They say that punishment cannot be inflicted because (i) the law is not in existence,[32] (ii) the legislative action is presumed to be a specific pardon for the particular offense,[33] (iii) the legislature, by repealing the act, intended that a general pardon should be extended to all those who were being prosecuted at the time for the specific act forbidden by the repealed statute,[34] and (iv) because the repeal wipes out the guilt of the accused and it would be unconscionable to punish an innocent person.[35]

In the absence of detailed reasons on the part of the courts it is difficult to know just what they mean by the general statements they use when declining to proceed with the prosecution on the ground of inability to punish the offender. This difficulty makes for the further difficulty that one cannot avoid giving the impression that one is setting up a straw man just to have the fun of knocking it down again. Yet the writer is unable to see why the repeal of a law which prescribed a punishment for a given offense should result in the offender going without any punishment. At the time the offense was committed the statute was in existence. A definite penalty at that time was known. Why cannot that penalty or any lesser but still adequate penalty be imposed by the court? The usual penal clause gives the court a fairly wide discretion. It fixes limits within which the court may move as it will. The specific penalty is rarely found in the statute books. Some local ordinances do give a fixed penalty, but the greater part of the more serious crimes are punished as the discretion of the court within the limits indicated may dictate. Why should the repeal of a statute be retrospective in regard to the penalty? Particularly pertinent is this question when the repealing statute increases the penalty for the like offense. There it must be evident that the legislative intent cannot possibly be construed as leniency toward the offender. The law does not justify the imposition of a penalty. That justification comes from the fact that the act which was forbidden was committed. The penal clause has for its purpose the protection of the offender from too severe a punishment, and the prevention of arbitrarily cruel punishments. If, therefore, the court would impose the punishment which the law itself fixed as proper at the time the act was committed the purpose of the repealed statute would have been carried out. To insist that the act should be against some law before it can be punished is wise; but where is the wisdom in insisting that the law should be in existence at the time the punishment is imposed? It is the act and its injurious consequences which start the procedural machinery moving. Once the offender is in the grip of the machinery why should the machinery stop? The offender is amply protected by conducting his prosecution according to the terms of the statute which he had broken. Society will be protected by carrying the prosecution through. The liability to punishment, it is urged, attached to the act at the time of the commission of the act. The prosecution is simply a method of procedure to make sure that the offender had committed the act. The final judgment simply shows that the act was or was not committed. It also indicates which part of the penalty that had attached to the act must be paid. The discretion exercised by the court under the "not less than nor more than" clause may cut off some of the penalty that attached. But it does not attach the penalty. The particular law does not need to be in force at the time sentence is pronounced in order to justify whatever punishment is imposed. The writer ventures to believe that the courts have been misled into the fallacy of accident, as the logicians put it.[36] They have argued from the general fact that there must be law before there can be a breach of law, which no one will dispute, to the particular fact, there must be a specific law in existence up to the time of final judgment upon a particular act, which is a non sequitur. It is submitted that all the circumstances which go to make up a crime should be carried along together until the courts can decide whether a given accused is or is not guilty

[31] 272 Fed. 114 (1921).
[32] Atoo v. Comm., 2 Va. Cas. 382 (1823); Mulkey v. State, 16 Tex. A. 53 (1884); Pleasant Grove City v. Lindsay, 125 P. 389 (1912); Halfin v. State, 6 Tex. App. 212 (1878); Sheppard v. State, 28 Am. Rep. 422 (1876); Hartung v. People, 22 N. Y. 95 (1860); Heald v. State, 36 Me. 62 (1853).
[33] Speckert v. Louisville, 78 Ky. 287 (1879); State v. Johnson, 12 La. 547 (1838).
[34] U. S. v. Tynan, 11 Wall. 88 (1871); State v. Thomas, 98 So. 887 (1921); State v. Henderson, 13 La. Ann. 489 (1852); State v. O'Connor, 13 La. Ann. 486 (1858); Speckert v. Louisville, 78 Ky. (1879).
[35] Day v. Clinton, 6 Ill. A. 476 (1880).
[36] Jones: Logic, Inductive and Deductive, 55 (1909).

of the crime, and that one of these circumstances is the law as it existed at the time the act was committed.

That the legislature of a given state can issue a general or a specific pardon for various offenses is no doubt true. That it can incorporate this pardon in express terms in a repealing statute is also true. If such a pardon is expressly declared within the repealing statute the courts have nothing to do but to discharge an offender before it, who is charged with a crime under the repealed statute. To continue the prosecution to the end would be waste motion and needless expense. But, it is submitted, the courts do not have the authority to read into a repealing statute a legislative pardon which is not there. They may "make" the law as well as "declare" it, but they cannot make legislative pardons. Nor, does the legislature issue a pardon when it repeals a law. Certainly no general pardon of the class of acts for one of which the offender is being prosecuted is issued when the repealing statute increases the punishment for that class of acts. The natural inference would be that the legislature intended to be more severe with offenders thereafter rather than more lenient. In the case of a straight repealing statute the most that can be inferred is that thereafter this kind of an act is not to be considered as punishable. It says nothing about pardoning past acts; and a pardon should not be read into it. It is difficult enough to protect society from evil doers. There is no imperative necessity to free one who may be a social menace by an implied pardon.

Does the repeal of a statute wipe out the guilt of an offender against that statute while it was in existence? The case of Day v. Clinton[37] says it does. This case presents an interesting state of facts. The accused was prosecuted for the violation of a city ordinance. The prosecution was begun before a city magistrate. The cause was appealed. Pending the appeal the city ordinance was repealed without a saving clause. Then another ordinance was passed repealing the repealing section of the previous ordinance, with a saving clause. The question was, Did the repeal of the repealing law revive the formerly existing ordinance? The court held that the repealing ordinance wiped out the guilt of the accused and left him as innocent in the eye of the law as if the original ordinance had never existed and rendered the court powerless to proceed further against him. Hence, the repeal of the repeal cannot revive the guilt of one whose offense has been wholly expurgated by the repeal of the law creating it. The learned court, however, does not show how or why the guilt of the accused was wiped out. In some mysterious fashion the accused has been washed in the ink of the statute and has become as innocent as a little child. Being innocent the repeal of his innocence is not possible. Evidently only guilt can be repealed. The magic of the repeal will not remove innocency. Surely to punish innocency would be unconscionable; and so punishment cannot be imposed. The writer confesses that such legal legerdemain is beyond his comprehension.

D. The Absence of Power in the Courts to Proceed With Prosecution

The fourth reason given by the courts when they refuse to continue a prosecution after the statute has been repealed, is that the courts have no jurisdiction. Two ideas are advanced in support of this contention; (i) the law which gives the jurisdiction is no longer in force;[38] (ii) the courts cannot proceed because the basis for procedure is gone.[39] This would be true even though the lower court had jurisdiction at the time it gave its judgment from which an appeal is taken.[40] In other words the courts seem to be of the opinion that their jurisdiction for the determination of a particular cause of action depends upon the existence of the specific statute.

It is of course true that if the statute definitely prescribes every bit of procedure, it must be followed before a final judgment can be delivered, that a repeal of the statute would repeal the procedural method which is to be followed. If therefore the crime is so integrated with the procedure that the destruction of the latter necessarily carries with it the destruction of the former judgment cannot be given. But I submit there are very few statutes of this type. If there are such they represent a confusion of ideas. An act is criminal whether the procedure to determine its criminality is of one character or another. Even if the basis for a specific kind of procedure has been destroyed, the courts have a general jurisdiction over crimes which enables them to carry on to a completion any cause which has come before them. If this were not so it would be entirely impossible to have common law crimes. But we do have common law crimes and the courts do punish criminals according to the common law method of indictment and conviction. The writer can see no reason for saying that because the legislature creates a new crime that it ipso facto, creates a method of procedure to go with it. Most of the penal statutes are simply statements that certain acts are to be held criminal and to be punished in a prescribed fashion. So far as the writer knows, there is no rule that the repeal of a statute which creates a particular offense repeals the general jurisdiction of the criminal court. Nor does the usual repealing statute, so far as he is aware, repeal in specific terms, the particular jurisdiction over the designated crime. The courts, therefore, can if they wish continue proceedings which have already begun even though they are unable to allow proceedings to begin *after* the repealing statute has been passed. Here again, it is submitted, the courts seem to be confusing their power to take cognizance of a particular act which the legislature says is outside their purview with their ability to carry on the examination into the quality of an act which was within their sphere of inquiry when the act was brought before them. They are trying to derive a special jurisdiction over a specific class of acts from a statute defining and punishing the acts, when they already have a general jurisdiction to try all acts which the legislature brands as criminal. The jurisdiction to try a particular offense is a general jurisdiction. It does no depend for its existence upon the existence of a statute creating the particular crime. Even if every criminal statute was repealed, the courts would still have jurisdiction over such acts as might be made into crimes, when they are so made, until the statutes giving them jurisdiction over crimes was repealed.

Furthermore the writer ventures to believe that the courts are using the word "law" in two senses. The

[37] 6 Ill. A. 476 (1880).

[38] Lunning v. State, 9 Ind. 309 (1857); Genkenger v. Comm., 32 Pa. 99 (1858); Ex Parte McCardle, 7 Wall. 506 (1868); Atoo v. Comm., 2 Va. Cases 382 (1823); Comm. v. Deane, 1 Binn. 601 (1809); U. S. v. Findlay, 25 Fed. Cases No. 15099 (1859); Miller's Case, Blackstone 451 (1764); Reg. v. Mawgan, 8 A. & E. 496 (1838); Commonwealth v. Marshall, 11 Pick. 350 (1831); Comm. v. Welch, 2 Dana 330 (1834); State v. Williams, 2 S. E. 55 (1887); Day v. Clinton, 6 Ill. A. 476 (1880); Pensacola Ry. Co. v. State, 33 So. (Fla.) 985 (1903); State v. Mansel, 40 S. E. 481 (1898).

[39] Ibid.

[40] See cases in preceding two notes.

first sense is a general one. It indicates that there can be no offenses committed unless there is a legal system of social control toward which the offense is directed. The second sense is a special one. It means that a specific statute must be in existence at the time the offender is being tried. If the word "law" is used in its general sense then the law is in existence at the time when the repealed statute is taken from the statute books. In this case law does exist and the pending prosecution can go on. If the word "law" means a statute then even though the statute has been abrogated, the jurisdiction is not destroyed because the particular statute did not confer the jurisdiction. In this case also there is no reason for stopping pending prosecution.

It is submitted further, that the idea concerning the courts' inability to proceed with pending prosecution, is based upon an unwarranted inversion of the statement made by Hale. He was dealing with a statute that contained a saving clause. All that he could say, so far as the statute itself was concerned, was that if a saving clause did exist, pending prosecution might proceed. It does not follow, however, that the absence of a saving clause would cause pending prosecution to cease. It is logically possible that in the absence of a saving clause, pending prosecutions might either go on or stop. The stopping is not a necessary outcome of the absence of a saving clause.

From whichever angle the matter is approached, the writer is unable to perceive any rational explanation for the law as it apparently exists. He submits, therefore, that in the absence of such reasons the law ought to be changed, because it often permits those who are actual, or potential, menaces to society to go at large by the mechanical application of an irrational phrase.

III.

The preceding sections have attempted to deal with the problem from an analytical and historical point of view. In this section the writer will try to approach the problem in its functional aspects.

The purpose of the criminal law is to protect society. It tries to prevent crimes. It does this by punishing the offender who has been guilty of crime and by the utilization of preventive safeguards. The punishment of the offender may be of a two-fold value. It can be retributive or deterrent. The deterrence may operate upon the offender himself so that he does not commit a similar offense again, or it may operate upon the other members of society so that they are restrained from committing like offenses. The first value is based upon the idea that society needs to be revenged. It is safe to say that this is an outworn idea and need not be further considered. The deterrent value is one that remains of importance in modern times.

In addition to its deterrent aspect, the criminal law tries to protect society by rehabilitating offenders so far as such rehabilitation is possible. Such rehabilitation is a protective measure in that it restores to society an asset which had been impaired and turns a potential, or actual, menace into an innocent agency.

If the protective function of the criminal law is definitely kept in mind, it becomes obvious that the repeal of a statute should not stop pending prosecutions at all. This becomes very clear when we examine the purpose for which the statute was placed upon the statute books.

The function of the ordinary penal statute is to delimit the sphere of activity upon which human beings must not enter and to impose a punishment upon those who are heedless of this delimitation. The members of the social group to whom the statute is directed, respond to its demands either because of the habit of obedience or through fear of the results of disobedience. The protective aspect of the statute is here found. The statute is truly preventive when it deters persons from doing that which is forbidden. It is deterrent only indirectly when it punishes for the breach of the statute.

When the statute has been violated the crime has been committed. The offender can only be punished or rehabilitated. The breach of the law is the indication that the offender is an actual or a potential danger to society. He has done that which has been forbidden. If he is to be deterred from repeating his act or others are to be warned off from doing similar things, and if punishment is imposed because it has this deterrent efficacy, then the dangerful quality of the offender is not removed by the repeal of the statute. He has already indicated a tendency to disregard statutes. This tendency might lead him to ignore other statutes as well as the one which had been repealed. If the repealing statute has increased the punishment to be meted out to offenders, letting him go unpunished will not meet the demand of society as it is represented by the repealing statute. Nor will it deter others, because there will be no punishment to act as a deterrent even though the act itself still remains proscribed. If the repealing statute simply takes the repealed statute from off the statute books and thus indicates that society no longer considers the act dangerous, there is of course no need of punishment to deter the other members of the social organization. But this does not dispose of the dangerous tendencies evidenced by the offender. The particular act is no longer held to be undesirable, but the tendency to do that which is forbidden is undesirable or is, at least, an indication that the offender is maladjusted to his environment. Such maladjustment calls, not for an unconditional release of the offender from legal custody, but, rather, for a careful examination into his evil tendencies, their causes and possible cure. It would seem, therefore, that pending prosecution for an act committed against a repealed statute should continue because of the opportunity it presents to examine into the anti-social tendencies of the offender. The law should not release one who has exhibited anti-social tendencies simply because the prohibition which gave occasion for the exhibition of the tendency has been repealed.

The same result is obtained when we look at the rehabilitating function of the criminal law. The particular statute which creates a crime and indicates a penalty is simply the agency which brings the socially maladjusted under the close observation of the courts. Once the offender has come into the courts it should be the function of the courts to make a thorough study of the offender so as to determine whether he *is* socially maladjusted. If he is found so to be, the courts should take such action as would result in his rehabilitation. If rehabilitation is impossible then necessary restraints should be placed upon the offender so as to render him less dangerous to society. The repeal of the statute can have no effect upon the question as to whether the offender is or is not actually or potentially dangerous to society. Penal statutes are passed and repealed for reasons that are usually unrelated to the question of the rehabilitation of social offenders. Such legislative action cannot be determinative of

judicial inquiry into the social aspects of the offender's previous behavior.

This does not mean that the court is to consider the offender who is brought before it as being guilty until proved innocent. The presumption of innocence may still exist while the very fact that the offender is before the court may be looked upon as indicative of the fact that the offender is in need of thorough examination. Such examination should not be ended simply because a statute is repealed.

In conclusion, the writer submits that the rule that the repeal of a statute stops all pending prosecutions initiated under that statute should no longer be followed. It had its origin in an unsupported phrase based upon an unwarranted inference. It has been blindly followed by the courts who gave no reasons why the rule was followed, or else attempted to bolster up the rule by reasons which, are specious. As the function of the criminal law is no longer purely retributive, and imposes punishments because it believes that punishments have a value in safeguarding society because of their deterrent effect, the repeal of the statute ought not to influence the carrying out of this function. The jurisdiction of the courts does not usually depend upon the existence of a specific penal statute. The repeal of such a statute cannot therefore operate to repeal the jurisdiction. With no sound reason apparent why the rule should continue to be applied, and with many reasons against such application, the rule should no longer be followed.

WHAT DAMAGE HAVE FIVE TO FOUR DECISIONS DONE?

Critical Examination of the Very Few Cases in Which the United States Supreme Court Has Held Acts of Congress Unconstitutional by a Five to Four Vote, with a View to Determining Just How Much Ground There is for the Furore Raised in Certain Quarters on the Subject

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IN estimating how bad (and possibly how good) in their effect on the country the decisions of the Supreme Court of the United States have been which have by a vote of 5 to 4 held unconstitutional acts passed by Congress, it is necessary to look critically at the cases. They have been very few.

Get in mind at the outset that in the 134 years of our Constitutional life, a time marked by foreign wars and the most stupendous of all civil wars, by territorial expansion without example, by material development beyond the full comprehension of even the people who possess it, by movements and countermovements of commerce of a magnitude never known in the world before, by the rise of manufacturing and industrial forces more powerful than the greatest monarchies used to be, by a competition of interests as highly organized and efficient as any military body ever was, and by the selfish and often unpatriotic activities of class organizations in politics, there have been only 9 five-to-four decisions holding unconstitutional an act of Congress—not 999, or even 99, as you may have surmised from the tumult and the shouting, but only 9.

The first case (Ex Parte Garland, 4 Wall. 333) arose in 1866, when our Constitution was seventy-seven years of age, out of legislation enacted when the punitive spirit of an overwhelming majority in Congress was probably at its worst following the Civil War. In 1862, when that war was a little over a year old, Congress directed that for the future every elected or appointed officer under the National Government must declare under oath that he had not borne arms against the United States or voluntarily given aid or counsel or encouragement to persons in armed hostility thereto, and that he had not accepted office in hostility to the United States, and so on. A supplemental act was passed in January, 1865, three months before the war ended. It forebade that any one "after the date of this act shall be admitted to the bar of the Supreme Court," or that any one should be admitted to the bar of any United States court after the fourth of the following March, until he had first subscribed to the oath in the act of 1862.

A. H. Garland, of Arkansas, who had in 1860 been admitted to practice in the Supreme Court, and who later became a member of the Congress of the Confederate States, applied in 1866 for readmission to the Supreme Court. As he had held office under the Confederate States, he could not, of course, take the oath. He claimed the right to appear in the court in which he had formerly practiced (1) because he had been pardoned by the President, and (2) because the Act of 1865, which applied to him the restrictions in the Act of 1862, was unconstitutional and void as *ex post facto*. On the constitutional question raised by Garland the Supreme Court held that the object of the Act was—

> To exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the Act, as against them, operates as a legislative decree of perpetual exclusion. . . . All enactments of this kind partake of the nature of bills of pains and penalties and are subject to the constitutional inhibition against the passage of bills of attainer, under which general designation they are included.

In other words, Garland was being tried, convicted, and condemned by a legislature, a body without judicial power, and also in violation of the constitutional provision which says that "no bill of attainder or *ex post facto* law shall be passed. The bill of attainder not pronouncing death was called a bill of pains and penalties. The Supreme Court said that the Act was violative of both prohibitions of the

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Constitution: it was an *ex post facto* law and it was a bill of attainder too.

The opinion of the court was written by Justice Field and concurred in by Justices Clifford, Nelson, Grier and Wayne. Justice Miller, joined by Chief Justice Chase and Justices Swayne and Davis, all four appointed to the court while the war was waging, dissented. They admitted that they "would feel a detestation for legislation" which would permit "convictions and sentences pronounced by the Legislative Department of the Government instead of the Judicial," or the infliction of punishment which had been "determined by no previous law or fixed rule," or which would permit investigation, if any, into the guilt of the accused "not necessarily or generally conducted in his presence" and where "no recognized rule of evidence governed the inquiry." It was precisely on those admitted propositions that the Supreme Court held the legislation void. When Garland joined the Confederacy this punishment was not prescribed. There had been since 1790 a statute punishing treason, and he was punishable under that had he not been pardoned. The President is given by the Constitution absolute power to pardon, save in a single instance, "except in cases of impeachment." President Johnson had pardoned Garland. "It is not within the Constitutional power of Congress," said the Supreme Court, "thus to inflict punishment beyond the reach of executive clemency."

When Garland went with the Confederacy he went with full knowledge of the law to punish treason. But he did not go with a knowledge that five years in the future, long after his step had been taken, another punishment would be added to the one then prescribed.

The contention of the minority was that the act of Congress did not prescribe a punishment, but only "a qualification of all who practice law in the National courts." Looking at the matter across fifty-seven years and unpossessed of the strong feeling which existed in 1866, one has difficulty in perceiving that when a man is debarred from his vocation because of his conduct he has not been punished. The dissenters said that he had not been punished "simply because there is here neither trial nor punishment within the legal meaning of these terms," for which reason "no one will pretend that the proceedings here can be successfully pleaded in bar of that indictment," meaning an indictment for treason. According to that reasoning a man who meets death by a mob does not undergo punishment. But those who wrote the clause in the Constitution knew that the worst punishments that had ever been visited upon men had been through proceedings where there was "neither trial nor punishment within the legal meaning of these terms."

In a companion case (Cummings v. State of Missouri, 4 Wall. 277) arising under the new Constitution of Missouri there was considered a provision that a man who had been in armed service against the United States, or who had adhered to its enemies by act or word, or shown "his *desire* for their triumph over the arms of the United States," should never vote or hold office in the State or in any corporation, should never be a professor or teacher in any school, and should never hold any real estate in trust for "any church, religious society or congregation." The Supreme Court said, in answer to the contention that the provisions were regulatory and not punitive:

> It [the oath] was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen.

Garland later (1855) became Attorney-General of the United States and sat with distinction in the Cabinet of President Cleveland. He was stricken by mortal sickness while making an argument before the court from which Congress would have barred him by "a legislative decree of perpetual exclusion." Time has subdued completely the rancors of those days and justified the decision. But had a vote of more than a majority of the justices (6 to 3 or 7 to 2) been required, as some contend for now, the Act of Congress would have stood and there would have thus been established in the United States the most abhorrent of all the odious oppressions known in the long catalogue of European tyrannies, the condemnation of the man by legislative decree, without hearing, without jury, without due process.

The next five-to-four decision (Pollock v. Farmers' Loan and Trust Company, 158 U. S. 601) was rendered May 20, 1895, and it held the Income Tax Act of 1894 unconstitutional because it was an unapportioned direct tax as applied to the income from real estate and also as to the income from personal property. The Constitution requires that "direct taxes shall be apportioned among the several States which may be included in this Union according to their respective numbers." The income tax had not been "apportioned among the several States."

The opinion was written by Chief Justice Fuller, with whom joined Justices Field, Gray, Brewer and Shiras. Dissenting opinions were written by Justices Harlan, Brown, Jackson, and White.

In early legislation Congress had applied direct taxes (which must be apportioned among the States) to lands, dwellings, and slaves. The court held that a tax on the income from lands is equivalent to a tax on the land itself, and that it should therefore be apportioned.

It was pointed out that the leading English authorities had invariably classified an income tax as a direct tax and it had been so treated in the courts of England and Canada. Being a direct tax, it could be valid only if apportioned. The decision provoked a great deal of fault-finding, the Democratic party and the People's party making it a campaign issue in 1896. The Republican party was silent on the subject. But the temper of the critics so cooled that the Sixteenth Amendment (removing the necessity for apportioning income taxes among the States) was not proposed until fourteen years had passed, and eighteen years had elapsed when the Amendment was adopted. It is an interesting historical fact that the agitation for an income tax was coincident with very hard times. In 1880 the Greenback party put a tax plank in its platform. The United Labor party took like action in 1888. Both the Democratic party and the People's party so declared in 1892, and again in the campaign in the year following the Supreme Court's decision of 1895.

But as a sweeper-away of "swollen fortunes" and therefore a benefit to the common people, as the politicians of the day promised the dissatisfied that it would be, the income tax has failed. Fortunes are still here, while multitudes of the rank and file who never expected to be touched are heavily loaded with the tax.

On April 15, 1901, the Supreme Court held (Fairbank v. United States, 181 U. S. 283) that the provision of the War Tax Act of 1898, requiring that a stamp be placed on "bills of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place," was violative of the prohibition in Section 9 of Article I, that "no tax or duty shall be laid on articles exported from any State."

The opinion was by Justice Brewer, Chief Justice Fuller, and Justice Brown, Shiras and Peckham. Justices Harlan, Gray, White and McKenna dissented.

Plaintiff in error had been convicted of issuing a bill of lading on wheat from Minnesota for Liverpool without placing a tax stamp on it. In the dissenting opinion it was pointed out that such an act had been passed in 1799 and had gone unchallenged and that another act had remained in force from 1862 to 1864. From that and other considerations it was argued that the tax was "in respect of the vellum, parchment or paper . . . and had no reference to the kind, quality or value of the *property* covered by such bill of lading." But far back, in 1827, the Supreme Court had held (Brown v Maryland, 12 Wheat. 419) invalid, in an opinion written by Chief Justice Marshall, a State occupation tax imposed upon importers, because in Section 9 of Article I a State is forbidden to tax imports or exports. What difference in principle between the two cases? As Section 9 contains two prohibitions, one upon the Nation and another upon the State, why should not Congress keep well inside the line of trespass?

The majority opinion in the Fairbank case said that "the requirement of the Constitution is that exports shall be free from any governmental burden. . . . We know historically that it was one of the compromises entered into which made possible the adoption of the Constitution." Those who have paid stamp duties at drug stores and other places have entertained the majority opinion, namely, that they were paying a tax on the article purchased and on the right to purchase. So the increase of postage for war purposes was a tax on one's mail or the right to correspond, not on the letter-paper. Congress could have raised plenty of money for the war with Spain without approaching (to say nothing of trenching upon) a clause of the Constitution which was repeatedly debated in the Constitutional Convention and which was written at the determined insistence of South Carolina and some other agricultural States. It was fitting that the case finally disposing of the question should have arisen in an agricultural State with respect to a tax affecting the shipping abroad of the most important product of the American farm.

The next five-to-four decision (The Employers' Liability Cases, 207 U. S. 463) was rendered January 6, 1908, and held that Congress, in exercising its power under the commerce clause of the Constitution, went too far in providing for the liability of railway companies "engaged in trade or commerce" to injured employes and to certain dependents of employes killed in the service, because it made no distinction between employes engaged in interstate commerce (of which Congress has jurisdiction) and employes engaged in state commerce (of which Congress has no jurisdiction) and erroneously included both. The opinion was written by Justice White and concurred in by Justices Day, Peckham, Brewer and Chief Justice Fuller. A dissenting opinion was written by Justice Moody, who conceded that "Congress has not the power directly to regulate the purely internal commerce of the States" and who said (p. 509) that "in the opinion of the whole court" it was "beyond the Constitutional power of Congress" to extend the benefits of this law to employes engaged in other work than interstate commerce. However, he thought that the Act could be read to relate only to employes engaged in interstate commerce. Another dissent was written by Justices Harlan and McKenna and another by Justice Holmes, both opinions expressing the theory stated by Moody. But Congress itself immediately recognized the correctness of the majority opinion by passing, three months afterward, another act confined in its operation strictly to interstate employes. This was sustained by the Supreme Court in Baltimore & Ohio v. Interstate, 221 U. S. 612.

On June 3, 1918, the Supreme Court (Hammer v. Dagenhart, 247 U. S. 251) held unconstitutional as not warranted by the commerce clause of the Constitution the Act of Congress of September 1, 1916, forbidding the transportation in interstate commerce of articles into the manufacture of which child labor had entered. The Act forbade a producer or manufacturer to ship in interstate commerce any article produced in any mine or quarry in which children under 16 had been employed within 30 days prior to the shipment, or the product of any mill, manufactury, etc., in which children under 14 had been employed, or children between 14 and 16 had been permitted to work more than eight hours a day or more than six days in a week, or after the hour of 7 in the evening or before the hour of 6 in the morning.

The opinion by Justice Day was concurred in by Chief Justice White and Justices Van Devanter, Pitney and McReynolds. Justices McKenna, Holmes, Brandeis and Clarke dissented, they believing that "the act does not meddle with anything belonging to the States."

The majority said (p. 276) that to hold this Act valid "would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States." The opinion added:

> This court has no more important function than that which devolves upon it the obligation to preserve inviolate the Constitutional limitations upon the exercise of authority, Federal and State, to the end that each many continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

With the disposition characteristic of legislative bodies to exercise power when they think they can, and in disregard of the legislators' sworn undertaking as stated by Cooley, not "to treat as of no force the most imperative obligations any persons can assume" by passing an act of doubtful

constitutionality, Congress, immediately upon the decision of Hammer v. Dagenhart, invaded the State again and undertook, by a provision in the Revenue Act of February 24, 1919, to regulate by taxation child-labor, and enacted that anyone employing children as before recited should pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to ten per cent of the entire net profits of the business—a confiscatory levy. The Supreme Court (Justice Clarke alone dissenting, without saying why) said (Child Labor Tax Case, 259 U. S. 20), after mentioning that taxes are occasionally imposed in the discretion of the legislature on proper subjects "with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous," that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." It pointed out that although Congress did not invalidate the contract of child-employment or declare the child-employment illegal, "it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard." The Court said that if validity were conceded to this law all that Congress would have to do "to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it." It added:

> To give such magic to the word "tax" would be to break down all Constitutional limitations of the powers of Congress and completely wipe out the sovereignty of the States.

The charge made at the time and often since that the Court was standing in the way of "social justice" and progressive public opinion is answered by the fact that five years before it had, by unanimous opinion, sustained (Sturges, etc., v. Beauchamp, 231 U. S. 320) the Child Labor Law of Illinois of 1903, which prohibited the employment of children under the age of 16 years in various hazardous occupations. And, therefore, the statement recently made by a senator of the United States was unwarranted, that "when we are so weak, our efforts so futile, that we cannot frame laws which will stand the test of courts to prohibit child labor," then the "common man" looks at the legislator and "even dares to look at the courts with some doubt and mistrust."

As the United States Department of Labor reports (Child Labor in the United States, page 11, *et seq.*) that from 1910 to 1920 the States (1) strengthened "in at least one-half" their number existing laws fixing the minimum age; (2) reduced the number of child-workers by raising educational and other requirements as conditions of employment; (3) increased the 8-hour-day limit for children under 16 from 7 States to 28; (4) forbade night work in 16 instances, leaving only seven States without such a prohibition; (5) increased legislative and administrative action to make those regulations effective; (6) raised generally the standards of compulsory education—every State having such a law—so that fewer children can be out of school; (7) reduced the number employed in mines 60 per cent while general employment increased 13 per cent; (8) decreased the number of children employed in the textile mills 29.9 per cent while general employment increased 75.9; (9) reduced the number in the cotton mills 46.1 per cent while general employment increased 101.9; and as over 61 per cent of all child-workers are with their parents on the land—is it not clear that the States had been attending to their own affairs with remarkable fidelity and that the two child-labor laws of Congress were impudent interferences as well as Constitutional transgressions?

Jefferson sensed the danger which that legislation illustrates:

> I believe the States can best govern our home concerns and the general government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both, and never to see all offices transferred to Washington.

There is too much local regulation performed in Washington now.

Those two child labor decisions of the Supreme Court prevented Congress from invading the province of the State in disregard of the command of the Tenth Amendment, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The great battles in Virginia, Massachusetts, New York, Pennsylvania, Maryland and some other States against ratifying the Constitution were because it contained no adequate defense for the State against the National power which would surely seek to dominate. This opposition was so very able and so general that a Bill of Rights was tacitly promised if the Constitution should be ratified. Accordingly, the first Congress proposed the first ten amendments. The last of them—the concluding word of the great instrument thus completed—is that the Nation shall leave absolutely undisturbed the sovereignty of the State in its own sphere. When Congress forgets this history or wantonly ignores it the plain duty of the Supreme Court is to maintain the Tenth Amendment. The most important law in this country to be observed is, not the Act of Congress, but the Constitution, "the supreme law of the land."

In March, 1920, the Supreme Court held (Eisner v. Macomber, 252 U. S. 189) that, notwithstanding that the Act of Congress of September 8, 1916, defined the word "dividends" subject to the income tax as including any distribution to shareholders out of the earnings or profits accrued, "whether in cash or in stock of the corporation," stock dividends so-called are not real dividends. The Court said that there can be no question that the interest of the stockholder evidenced by his certificate is his interest in the capital. When capital accumulates and he receives in the form of another certificate a written evidence of the accumulation he gets nothing that he can spend as he would spend a dividend. Of course, he can sell the new shares, but that would no more bring him a dividend than he would have had a dividend had he sold some of the old shares. In either case he would be disposing of his capital. Such a sale of capital interest would be subject to a tax under the Revenue Act, but would not be taxed as income. The gist of a long discussion is contained in this paragraph (p. 212):

> We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.

That decision has been accepted as authority and followed by the highest court of England.

The opinion was by Justice Pitney, Chief Justice White, Justices McKenna, McReynolds and Van Devanter. Justices Holmes, Day, Brandeis and Clarke dissented. Justice Holmes believed the Sixteenth Amendment was intended to "put a question like the present to rest"; and Justice Brandeis said substantially that everybody understood the stock dividend to be a dividend. The Sixteenth Amendment was not intended to enlarge the taxing power of Congress—it simply removed the necessity (Brushaber v. Union Pacific, 240 U. S. 1) which had been imposed by Article I, Section 2, of apportioning direct taxes "among the several States . . . according to their respective numbers." If the increase of capital interest was not a dividend before the Sixteenth Amendment was adopted, that Amendment did not purport to make it a dividend.

This decision did not prevent Congress from taxing a distribution of surplus (what it had really undertaken to do), or a surplus not distributed; it merely held that an accumulated surplus evidenced by new shares of stock is not a dividend. Accordingly, in the Revenue Act of 1921 Congress provided for an additional tax of 25 per cent where a corporation prevents the imposition of a surtax upon its stockholders by permitting profits unduly to accumulate instead of dividing and distributing them as dividends.

Thus orderly and Constitutional procedure was brought about by the decision.

In May, 1920, the Supreme Court held (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149) that Congress could not transfer its legislative power to States, that power being by nature "non-delegable." There is no question that a legislative body cannot delegate to another body its legislative power. By an act of October 6, 1917, Congress undertook to change the law stated by the Supreme Court in the preceding May in Southern Pacific Company v. Jensen, 244 U. S. 205, where it was held that the Workmen's Compensation Law of the State of New York did not apply to an injury sustained by an employe on a steamship plying between New York and Galveston while it was discharging its cargo in North River, New York, "lying in the navigable waters of the United States," the case falling "within admiralty and maritime jurisdiction." Congress immediately enacted that in all civil cases of admiralty and maritime jurisdiction there should be saved "to claiments the rights and remedies under the Workmen's Compensation Law of any State." The Supreme Court, following a decision in 1874 (Lottawanna Case, 21 Wall. 558), held that when the Constitution provided that the judicial power of the United States "shall extend . . . to all cases of admiralty and maritime jurisdiction" a purpose was disclosed not "to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character." It said further that as the Constitution itself adopted and established as part of the laws of the United States the general maritime law and empowered Congress to legislate with respect to it, necessarily it took from the States all power to contravene, by legislation or judicial decision, the essential purposes of or to work material injury to the characteristic features of such law. It stated that from the beginning the federal courts had recognized and applied the rules of maritime law "as something distinct from laws of the several States, not derived from or dependent on their will."

The opinion was by Justices McReynolds, Van Devanter, McKenna, Day and Chief Justice White. Justices Holmes, Pitney, Brandeis, and Clarke dissented, expressing the belief that the act of Congress did not attempt to delegate legislative power to the States, but rather adopted as the act of Congress the existing legislation of the States.

Congress promptly conceded the soundness of the Supreme Court's decision by passing an act in the following month (June 5, 1920) applying to seamen the provisions of the Employers' Liability Act regarding employes of interstate railways (what it should have done in the first place); and that act was sustained last May by the United States Circuit Court of Appeals for the second circuit.

In 1921 the Supreme Court construed (Newberry v. United States, 256 U. S. 232) the language of Section 4 of Article I of the Constitution, which says that "the times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but Congress may at any time by law make or alter such regulations except as to the places of choosing senators."

The Court had under consideration the Corrupt Practices Act of Congress of June 25, 1910, which forbids a candidate for a seat in the House of Representatives or for a seat in the Senate to contribute or expend "in procuring his nomination and election any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend or promise, under the laws of the State in which he resides." The defendant was charged with having made use of more money than the law of his State permitted, not in an effort to control a regular election, but in the primary election which has in some of the States superseded the party nominating convention. The decision was that the Act of Congress could not constitutionally include the primary election. The selection of a party candidate who will later run for election "is in no real sense," said the Court, "part of the manner of holding the election." However the candidate may be offered—by convention, by primary, by petition, or voluntarily—that "does not directly affect," said the Court, "the manner of holding the election." The "manner of holding elections" is the only subject, the Supreme Court held, that the Constitution empowers Congress to regulate.

The opinion was by Justices McReynolds, Van Devanter, Day, Holmes and McKenna. There was a dissent by Chief Justice White and Justices Pitney, Brandeis and Clarke, they believing that the nomination of a candidate in a primary should properly be held as part of the election. On account of errors committed by the trial court they concurred in the reversal of the judgment, but they

dissented from the proposition that the language of the Constitutional clause relating to the "manner of holding elections" is not broad enough to cover nominating primaries.

The last decision (Adkins v. Children's Hospital, ———, U. S. ———, 43 Sup. Ct. R. 394) to arouse criticism was rendered on April 9, 1923. Although the decision was 5 to 3 (Justice Brandeis not participating), it will, because of its importance with respect to labor, of the comment which it has drawn, and of its having been by majority vote, be considered here as though it had been 5 to 4. The Court held unconstitutional, as a taking of property and a denial of liberty forbidden by the Fifth Amendment, an Act of Congress of September 28, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia (over which the Constitution empowers Congress "to exercise exclusive legislation in all cases whatsoever") through a board of three members, one representing employers, another representing employes, and the third representing the public. The board was authorized to investigate and ascertain the wages of women and minors in different occupations, to examine books and require information of employers, and to declare "standards of minimum wages for women . . . and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals," and also to declare minimum wages for minors. The board fixed $16.50 a week for women in mercantile establishments; $15.50 for those in printing offices; $15 for employes in laundries, with $9 for beginners. No reason was shown why women in different occupations required different incomes "to maintain them in good health and to protect their morals." Two suits were started to restrain the board from enforcing its order, one by a hospital for children and another by a hotel.

Reviewing its various decisions sustaining laws fixing the length of a worker's day and the selection of employes on public works, sustaining laws commanding that wages be paid in money instead of scrip or store orders and at stated times, sustaining laws limiting the hours of labor generally and laws limiting the ages at which children may be employed, the Supreme Court showed that the principle involved in the Adkins case differs from all those in the cases reviewed and that nothing that had been previously decided afforded any "real support for any form of law establishing minimum wages."

Said the Court:

> It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors) who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—freely to contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employe. The price fixed by the board need have no relation to the capacity or earning power of the employe, the number of hours which may happen to constitute the day's work the character of the place where the work is to be done, or the circumstances or surroundings of the employment, and, while it has no other basis to support its validity than the assumed necessities of the employe, it takes no account of any independent resources she may have.

The law takes account, the Court said, only of the necessity of the employe, entirely ignoring the ability of the employer's business to sustain the burden, and containing no requirement for the giving by the employe to the employer of value in service equivalent to the pay. While the employer is compelled to pay, the employe is required to render nothing. Congress therefore left half of the problem not only unsolved, but also unmentioned.

The Court made the following comment upon the present-day tendency to be generous and even prodigal with other people's money:

> To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and, therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

Holding the act of Congress to be violative of the Fifth Amendment by depriving the employer of liberty (to contract with and pay employes with respect to their efficiency and earning power) and property (money given without full value returned), and sustaining the decision of the Court of Appeals of the District of Columbia, the Supreme Court concluded:

> A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the services, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract and employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

In one of the cases decided a woman 21 years of age was employed by a hotel company as an elevator operator at $35 per month and she received free two meals (at least $1) a day. She testified that the work was light and healthful, that the hours were short, that the surroundings were clean and moral, and that she was anxious to continue in the place for the compensation agreed upon and that she did not earn more. But the employer was obliged to dispense with her services because of the order of the board and on account of the penalties prescribed by the law. She could find no other work which she was capable of performing that would pay her so well.

The opinion was by Justices Sutherland, McReynolds, Van Devanter, Butler and McKenna. A dissent was written by Chief Justice Taft in which Justice Sanford concurred. Another dissent was written by Justice Holmes. Justice Brandeis took no part in the consideration of the case or its decision.

Reviewing the cases which have been decided favorably to labor, the Chief Justice said that he could not feel that on the basis of reason, experience, or authority a distinction should be drawn between maximum hours and minimum wages. Justice Holmes made the same point. But the Chief Justice could not agree to some of the general observations in the dissenting opinion of Justice Holmes.

Any employer, knowing as he does that one employe may earn twice or thrice as much as another at the same bench or work-table or in the

same department, would doubtless say that the distinction between the law here under consideration and a law limiting the day to eight hours is that under the eight-hour law he is still permitted to contract and pay according to the relative earning power or efficiency of the various employes and is not required to pay, for example, $5 in wages to a $3 worker—is not subjected to confiscation of his property. In each of the great number of labor laws which the Supreme Court has upheld the employer was left free to pay according to the relative worth of the different employes. But this law forbids distinction between the superior and the inferior.

No one will contend that the employer should be permitted to contract so as to grind the faces of the poor. But organizations and public opinion and State legislation have taken very good care of that through the years, and progress is still making.

But should the majority of the American people believe that the time has come when employment should in all cases provide a good living (not yet defined) to each female (and if female, why not male?) employe, regardless of her strength, skill or brains to earn it, then they may modify and relax as to Congress the Fifth Amendment (protecting liberty, property, and due process) and the Fourteenth as to the State legislature and direct the employer to take from the people advances of prices sufficient to sustain the new burden cast upon employment by making it to a degree an eleemosynary institution. For by amendment they may put anything in the Constitution, as has recently been shown to the great confusion of the critics who had held it worthless because practically, as they said, not amendable at all. But however much desired changes may be, they should not be accomplished by unconstitutional means. On this the greatest of Americans and patriots said in his Farewell Address:

> If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

St. Paul put it to the Corinthians in a short sentence: "Let all things be done decently and in order."

Of course, the only justification for requiring the employer to help the employe beyond his or her capability to earn is the general welfare, the public good. That is the claim of the advocates of such legislation and that purpose is clearly stated in the Act of Congress under consideration. But our Constitution contains two prohibitions against the taking of private property "for public use without just compensation," that in the Fifth Amendment being a restriction upon Congress and that in the Fourteenth upon the state legislature. In taking private property for public use during the World War and at other times Congress never has thought of asking or requiring the owner to give it without full compensation. When the National Government has desired to erect a fort or a post office or to establish any other public service the private owner has been given "just compensation" out of the public treasury. And thus should the public pay for benefits received. But in the minimum wage legislation it is proposed to take private property (where wages are not fully earned) for the general welfare without compensation. Until the Constitutional barrier just before quoted has been removed from the path of Congress by regular Constitutional amendment private property cannot thus be taken, no matter how much the public welfare may seem to require it; and it is in nowise the province of the Judicial Department in effect to amend the Constitution by removing through "interpretation" the obstruction which the people—the source of all power—placed in the way of the Legislative Department for the protection of the man.

Returning to the opening question: What damage have 5 to 4 decisions done?

Not only has none of them impeded the progress of the United States, but each plainly has had a steadying effect upon the ship and speeded it along in the true course. An examination of the foregoing cases must convince one of the surpassing wisdom of the Founders of the Republic when they established what has been aptly termed the greatest of American inventions, the Judicial Department of the government. In the Constitutional Convention itself they had found what all men know, that questions will come up on which it is impossible to reach agreement. Washington mentioned in his letter to Congress the compromises which had been necessary in the Convention. Yet, no matter how sharp the division of opinion or how fierce the feeling, those cases must be decided as well as easier ones and the decision by the Constitutional tribunal is the decision of all the people—it is their Constitutional will.

Professor A. V. Dicey, of Oxford University, the greatest Englishman of his time writing on Constitutional law, clearly comprehended what the foregoing cases disclose, namely, "that enactments of the legislature might, without being in so many words opposed to the Constitution, yet be of dubious constitutionality, and that some means would be needed for determining whether a given law was or was not in opposition to the *principles* of the Constitution."

He said that the Americans solved the problem. They "directed their attention, not so much to preventing Congress and the other legislatures from making laws in excess of their powers, as to the invention of means by which the effect of unconstitutional laws may be nullified. . . . This system, which makes the judges the guardians of the Constitution, *provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.*" Italics are mine.

Dicey says that the American judicial method "is exerted with an ease and regularity which has astounded and perplexed Continental critics."

The Englishman, the Canadian, the Australian, the Argentinian, the Brazilian, and many others understand and therefore value very highly our Constitutional system; but as the American never has been taught much of anything about it, he must accept in silence the wildest criticism of it from the ignorant at home. Therefore, let us rise up and teach.

LAW SCHOOLS MEET ASSOCIATION STANDARDS

IN 1921, the American Bar Association adopted a resolution to the effect that every candidate for admission to the bar should graduate from a law school complying with certain standards. It directed the Council on Legal Education and Admissions to the Bar to determine what law schools comply with these standards and to publish from time to time the names of those law schools which comply and those which do not. After extended investigations as to the law schools of the country, the Council has prepared a list of schools which, in its opinion and from the evidence which it has been able to obtain, now comply with these standards. It has also prepared a list of certain schools which do not now comply with the standards, but which have announced their intention of complying with them at some time in the near future.

The Council is not now prepared to publish a list of the schools which do not comply as there are some schools concerning which further information is needed before it can determine definitely in which class they belong.

The standards laid down by the American Bar Association for an approved school are as follows:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

In determining whether a school complies with these standards, the Council has found it necessary to make certain interpretations and rulings. The most important of these rulings are as follows:

A school does not comply with the standards unless it complies with all of them as to all of its departments or courses. As an example, an institution maintaining both a day school and a night school, one of which complies and the other of which does not, cannot be considered as complying.

A school which admits certain students who do not fully meet the entrance requirements will not be considered as failing to comply with standard (a) provided the number of such students does not exceed 10 per cent of its enrollment.

The following are the schools which the Council considers as now complying with the standards or which have announced their intention of complying in the immediate future, those of the first class designated as class A and those of the second class as class B, with a statement as to class B of the year when full compliance is expected.

JOHN B. SANBORN, Secretary.

CLASS "A"

California, University of,
School of Jurisprudence,
Berkeley, Cal.

Chicago, The University of,
The Law School,
Chicago, Illinois.

(Note—This school now admits students who are over twenty-two years of age as candidates for the degree of LL. b. with less than two years of college work, but the proportion of such students is not in excess of the proportion of special students of some schools in class A. From the fall of 1924, all students will be required to have at least two years of college work.)

Columbia University,
School of Law,
New York, N. Y.

Cornell University,
The College of Law,
Ithaca, N. Y.

Colorado, University of,
School of Law,
Boulder, Colo.

Cincinnati, University of,
College of Law,
Cincinnati, Ohio.

Drake University,
The College of Law,
Des Moines, Ia.

Emory University,
The Lamar School of Law,
Atlanta, Ga.

Harvard University,
The Law School,
Cambridge, Mass.

Hastings College of Law,
(University of California)
San Francisco, Cal.

Illinois, University of,
College of Law,
Urbana, Ill.

Indiana University,
School of Law,
Bloomington, Ind.

Iowa, The State University of,
College of Law,
Iowa City, Ia.

Kansas, The University of,
School of Law,
Lawrence, Kansas.

Michigan, University of,
Law School,
Ann Arbor, Mich.

Minnesota, University of,
The Law School,
Minneapolis, Minn.

Missouri, The University of,
School of Law,
Columbia, Missouri.

Montana, University of,
The School of Law,
Missoula, Montana.

Nebraska, The University of,
College of Law,
Lincoln, Neb.

North Dakota, University of,
The School of Law,
Grand Forks, N. D.

Northwestern University,
The Law School,
Chicago, Ill.

Oklahoma, University of,
The School of Law,
Norman, Oklahoma.

Ohio State University, The
College of Law,
Columbus, Ohio.

Oregon, The University of,
The School of Law,
Eugene, Oregon.

Pennsylvania, University of,
The Law School,
Philadelphia, Pa.

Pittsburg, University of,
School of Law,
Pittsburg, Pa.

South Dakota, University of,
School of Law,
Vermillion, S. D.

Stanford University,
The Law School,
Palo Alto, Cal.

Syracuse University,
College of Law,
Syracuse, N. Y.

Texas, The University of,
The School of Law,
Austin, Texas.

Trinity College,
School of Law,
Durham, N. Carolina.

Virginia, The University of,
Department of Law,
Charlottesville, Va.

Washburn College,
The School of Law,
Topeka, Kas.

Washington University,
The School of Law,
St. Louis, Mo.

Washington & Lee University,
School of Law,
Lexington, Va.

Western Reserve University,
The Franklin Thomas Backus
Law School,
Cleveland, Ohio.

Wisconsin, The University of,
Law School,
Madison, Wisconsin.

Wyoming, University of,
The Law School,
Laramie, Wyo.

Yale University,
School of Law,
New Haven, Conn.

CLASS "B"

Alabama, University of,
School of Law,
Tuscaloosa, Ala. (1926)

Baylor University,
Department of Law,
Waco, Texas. (1925)

Boston University,
The School of Law,
Boston, Mass. (1925)

Florida, University of,
College of Law,
Gainesville, Fla. (1924)

Georgia, University of,
Law Department,
Athens, Ga. (1925)

Idaho, The University of,
The College of Law,
Moscow, Idaho. (1925)

Tennessee, The University of,
College of Law,
Knoxville, Tenn. (1925)

Tulane University of
Louisiana,
College of Law,
New Orleans, La. (1926)

West Virginia University,
The College of Law,
Morgantown, W. Va. (1924)

THE CYCLE OF LAW

Opposing Principles of Justice According to An Iron Standard and Justice According to Conscience Mark the Extreme Points Between Which Law Has Fluctuated in the Course of Its Development

By Homer Hoyt

Associate Professor of Economics, University of North Carolina
Member of District of Columbia Bar

THE quest for legal justice leads to two principles, apparently as wide as the poles asunder. One principle states that unlimited freedom to decide each case upon its merits—according to equity and conscience—is indispensable to justice, while the other principle just as positively proclaims that unlimited freedom to decide cases according to equity and conscience leads to the abuses of the Star Chamber and the Third Degree. One principle decries the rule of precedent as the source of injustice, the other principle lauds it as the very foundation of justice. Thus do the oracles of justice seem to contradict each other and cause laymen to believe that the legal system blows hot and cold at the same breath.

The paradox set forth is no figment of the imagination but a real problem in the growth of law. The opposing principles of justice according to an iron standard and justice according to conscience mark the extreme points between which the law has fluctuated in the course of its development. *The Cycle of Law* embraces the period in which the law has started from a system in which one of these principles dominated, has gradually changed to a system in which the opposite principle held mastery, and has finally come back again to a condition similar to the starting-point. It is the purpose of this paper to describe this cycle in very briefest compass, to indicate the fundamental forces that have moved through the maze of decisions, statutes, constitutions, codes constituting the outward barometer of the law, to give a hasty glimpse at the general trend of centuries of legal history, omitting from view the vast minutiae of special rules so vital to the individual case, passing swiftly by whole subjects of substantive law, and the entire science of pleading in order that the general contour of the legal woods may stand forth in clear relief.

There is no inevitable beginning nor end to such a study, nor is there any chosen people whose laws have prior claim to such a survey. It is probable that tablets of laws that crumbled to dust before the Code of Hammurabi or the Roman Laws of the Twelve Tables have gone through a process of development similar to that about to be described, but it is needless to search in the ashes of Assyrian cities for the judgment rolls of a forgotten civilization, when evidence written in bold type in the year-books of Edward I tells us the story of the genesis of the very laws under which we are living today. The theory of the cycle of law will accordingly be illustrated by the development of the American common law or, rather, its English prototype.

In describing a continuous process that winds back to a place similar to a preceding phase in its course, it makes no vital difference where a start is made. It will be convenient, however, to begin at that phase of the cycle that is characterized by stability and respect for precedent, because a legal system that has crystallized into a definite form presents a tangible substance for analysis and the record of judgments or stone tablets to chronicle the finality of its achievement. A period of static equilibrium was attained by the English law by the end of the thirteenth century. By that time the reaction between the frontier justice of the Anglo-Saxons and the refined law of the Normans had produced one fairly homogeneous system of English law; the blood feud, the wager of battle, and rough and ready methods of self-help had been partly eliminated and partly disciplined by technical procedure; scattered local customs, opposing traditions had become merged into the King's justice administered by the King's courts; and the young legal system had grown until its height was measured by its 471 writs and it no longer possessed the power to add another writ to its stature.

At the stage of the cycle which has been arbitrarily selected as a starting-point, the English law had emerged from the unstable period of growth during which its form and content hung in a balance of principles and customs; it had reached the age of assimilation, analysis and codification. The characteristics of a legal system that had arrived at years of maturity could be read in the respect for precedent, the technical rules of pleading, the formality of writs, the dignity and solemnity of judicial procedure, the pompous Latin phrases incomprehensible to laymen, the fees and delays of court trials, the rise of a professional class of lawyers and the codification of the law by Bracton. At that time in its life history, the law delighted to wield the new-found powers that arose out of seal and parchment, writ and oath. It demanded the strict observance of form rather than an inquiry into the fundamental merits of the case; inclining its judgment scales in favor of the debtor when he could successfully pass the prescribed ritual by producing eleven neighbors to swear he did not owe the money, and inclining its scales in favor of the creditor when one false move on the part of the debtor or his aids—a mispronounced word or the lowering of an arm before the proper time—broke the charm of the elaborate symbolism. Thus the static law brought order and respect for authority out of the chaos of Anglo-Saxon law at the expense of equity and conscience.

The movement away from the static equilibrium—like all organic movements—grew out of the very conditions of stability. The crystallization of causes of action into 471 specific forms had practically closed legal machinery to new causes of action, because as these various forms became related to each other by a net-work of logical analysis so that they grew into an organic whole, it became more and more difficult to graft an alien on to the existing system. The forces of habit, tradition and inertia under the guidance of clerks and lawyers schooled in the prevailing forms also tended to keep the law within its accustomed channels. While the law was thus steeling itself against

change through external pressure, the power of forces of change was rapidly increasing. Even in the customary society of the thirteenth century some new legal situations would unavoidably arise out of the permutations and combinations of social dealings, but when the Black Death and the Peasants' Revolt produced great upheavals in the quiet flow of English life, the number of adjustments not provided for by the legal system was bound to increase at a progressive rate.

The first external evidence of a movement away from a condition of fixity was noted by the statute of Westminster II (A. D. 1285) which provided authority for new remedies to meet new causes of action. This was only a partial solution of the problem, however, for the statute was directed against well-established habits and interpreted by hostile judiciary so that it was almost made nugatory. The increasing inflexibility of law as contrasted with the growing needs of the times forced some changes by underground channels. When a change was camouflaged in an elaborate fiction, the pride of technicality was either appeased or the blind side of the judges successfully approached, for many changes crept into the fold of the common law disguised under old forms. The requirement that no title to land could be transferred without a deed was avoided by the fiction of lost grant —allowed claimants of land by adverse possession— wherein the litigant would brazenly allege that a deed had been granted to a remote ancestor, but that it had been lost. The court would wink at these and many other subterfuges of like nature, and by refusing to allow any investigation of their truth practically inaugurate a new rule of law. Thus the common law became more artificial and technical as society receded from it.

The rigor of the common law finally forced another system to spring up side by side with it—a system which embodied the contrary principle of jurisprudence, namely the decision of each case on its merits. The pressure of suitors unsatisfied by a system of common law that had now become decadent forced the development of a court of chancery or equity which sought without reference to precedent or form to achieve substantial justice between the parties. The court of equity was established by the king under the authority of his undistributed reserve power to decide cases when the common law courts could not afford relief. The new equity courts had jurisdiction of the person, their orders were binding on the conscience and could be enforced by jail sentences. Their power was not limited to existing forms but they could devise any new remedy to meet any new situation, and their decrees were binding on even the common law courts, for they could enjoin any judgment which was against their ideas of justice. The common law courts continued in existence without interruption, and handed out decisions based on precedents the same as before, but they were now subject to the control of another court which could set them at defiance when a proper case for equity arose. The anomaly—so hard for a layman to understand—of two systems of law, common law and equity, administered in the same place over the same subject-matter sometimes by different courts and sometimes by the same court or the same man sitting on the same bench, thus crept into our legal system because of the inevitable antagonism between the two fundamental principles mentioned in the opening paragraph.

The common law, however, could not remain shut up in an air-tight compartment when confronted by equity. The common law judges found it to their self-interest and to the self-interest of their science to moderate the fixity of the common law in order to extend their jurisdiction before equity arrived. Consequently a race began between the common law and the chancery courts to liberalize their views and to grant new remedies. The whole equitable doctrine of quasi-contracts was developed by the common law under the spur of the competition with equity. Thus the interaction between equity and the common law finally produced a situation in which far more attention was paid to deciding cases on their merits than ever before. By the time of the seventeenth century, the half of the cycle was completed and law was at its greatest period of flux.

From this high water mark of justice according to conscience, unimpeded by precedent, the law again returned to a static equilibrium. Again the retrograde movement began while the very reign of equity was at its height. Complaints began to be made that the Court of Equity enjoyed complete freedom from any salutary control, and that decisions according to conscience varied with the conscience of each Chancellor which varied, as was later said by Selden, with the length of the foot of each Chancellor. The decisions of the Chancery Courts were unwritten, and no attempt was made to consult or follow precedent, the Court of Chancery being similar in this respect to the notorious Star Chamber. While complaints against the uncertain and capricious nature of equity were thus being made, equity was more or less unconsciously imitating many common law forms and among them a leaning toward precedents. Gradually equity crystallized into a definite form just as the common law had before it, the chancery cases were printed and acquired binding authority as precedents just as the common law cases had become binding. Equity, while not so formal as the common law, finally described its metes and bounds with the same care as the common law, and the conscience of the chancellor ceased to be the varying moral ideals of individuals and became the incorporated conscience of generations of chancellors. Thus equity in turn became closed to new forces and reached maturity. In the meantime by a process of judicial legislation under Lord Mansfield, the common law had assimilated the Law Merchant which for a long time existed as an exotic system, unrecognized by the common law. Thus renovated and enlarged, the combined system of common law and equity by the middle of the eighteenth century again reached a static equilibrium and a complete cycle had been transcribed.

The cycle which succeeded the long period which spanned the thirteenth and the eighteenth centuries had proceeded much more rapidly. After an interval of quiescence—the period of static equilibrium in which precedent and custom held the throne—lasting in England to the middle of the nineteenth century and in America to the beginning of the twentieth century, the complete swing of the pendulum from stability to equity—covering half the cycle—was made in a few decades. Discontent with the fundamental assumptions of law elaborated after five hundred years of painstaking effort was precipitated by the industrial revolution which suddenly showered titanic changes upon society so as to disrupt old relationships and to usher in new legal problems in ever increasing numbers. The common law, adjusted to pre-revolution times, could not keep pace, even by judicial legislation and the twisting of old rules, with the demands created by the presence of machinery, widening markets, the

growth of cities, large-scale production, trade unions, and the woman's movement. In the nineteenth century, the return to the principles of justice according to equity and conscience began through legislation and the movement rapidly gained in volume and intensity until by the early part of the twentieth century—in the present day—the flood of statutes has probably reached its high water mark. In the course of this "rain" of statutes, even the equity courts themselves, the original fountains of justice according to merit, were thoroughly renovated and purged of the accumulations of precedent which prevented them from fulfilling their particular function, and new administrative bodies with wide discretionary powers were created to supply the needed elasticity in our legal system. At last, however, the career of statute-law which has almost become an epidemic seems to have reached its zenith, and after the wildest experiments in legislation, we seem now ready to return to more stable and scientific standards. Already some legislators are beginning to recognize that their power is not omnipotent, and that there is a limit to the good that can be accomplished by a mere fiat—and this is a sure sign that we are receding from naive confidence in our ability to fly to the social paradise by passing a law. It is probable, however, that we shall not return to another static equilibrium without a thoroughgoing reconstruction of some of the fundamental premises which underlie present legal theory.

The moral told by the Cycle of Law is probably unwelcome to the reformers who hope to bring about the social millennium by a single stroke of legislation, for a common law that has withstood the shocks of equity reform and the deluge of statutes and codes undoubtedly has sufficient toughness to meet the strain of future storms. On the other hand, since the longevity of the common law has been due to the fact that its elasticity permitted it to bend under a weight that would have crushed a rigid substance, the moral can afford but little comfort to the reactionaries who expect to keep an iron lid pressed down upon forces of change. In the far-reaching panorama of legal history that has been flashed before the reader, all the apparent contradictory elements in law appear as part of one great movement. Statutes, equity, judicial legislation, are the methods by which the law grows and expands, while common law decisions, and constitutions are the ways in which the new growth is assimilated to the old system. Thus the law grows like a sturdy oak, adding successive rings of sap to the inner heart wood until it develops strength and stability without losing its capacity to add new branches and to stimulate the flow of sap that keeps the whole organism alive.

Law attains its golden mean when it supplies a remedy for every injury while adhering to stable principles, when it represses violence and unstable conditions with one hand and dispenses new theories of justice to fit new conditions with the other, in short when it coincides with the predominant aspirations of society by happily uniting the opposing principles of stability and equity. The law fluctuates above and below this golden mean, the magnitude of the oscillations being great when society is in a state of flux and small when society is bound by custom, but whether the deviations are large or small the law tends ever to seek its level despite the dams interposed by legislatures or courts.

STATE AND LOCAL BAR ASSOCIATIONS

California Votes for Incorporation of State Bar—Important Matters to Be Discussed at Coming Annual Meeting in Kansas—Iowa Bar Association Indorses Higher Educational Standards—Michigan for Self-Governing Bar

CALIFORNIA

State Association Votes in Favor of Incorporating Bar and Takes Steps to Raise Standards of Admission

The California Bar Association at its meeting held at Stockton on October 12th and 13th, voted unanimously in favor of incorporating the State Bar. The committee report recommending such action was presented by Mr. Joseph J. Webb, of San Francisco, who outlined the history of the movement to secure better control over the discipline of the profession by this method. He stated that his committee has been in correspondence with the bar associations of fourteen states that were studying the question, including those of North Dakota, Idaho and Alabama, which have already secured the adoption of similar acts. Steps will be taken to push the matter before the legislature.

The annual address at the meeting was delivered by former Governor Leslie M. Shaw, of Iowa, on the subject, "A Republican Form of Government versus Pure Democracy." The address was greatly appreciated and at its close the distinguished speaker received a remarkable ovation. Other able addresses were delivered during the session by Hugh Henry Brown of Tonopah, Nevada, on "Our Generation and the Constitution"; Lewis H. Smith of Fresno on "The Right of the Supreme Court to Declare Acts of Congress Unconstitutional"; Walter K. Tuttle of Los Angeles on "Necessity and Means of Expediting Criminal Law Enforcement"; C. E. McLaughlin of Sacramento on "Dangers of Encroachment on Constitutional Guaranties of Personal Rights and Liberties." President Butler's annual address on "The Relation of the Constitution to the Security of the American Institutions" was splendidly prepared and provoked much applause. Mr. Arthur J. Levinsky, President of the San Joaquin Bar Association, delivered the address of welcome, to which a fitting response was made by Mr. Eugene Daney of San Diego.

Reports of various sections provoked interesting discussions. This was particularly true of the recommendation of the Section on Legal Education and Admission to the Bar that the association reaffirm its previous endorsement of the standards of legal education and admission advocated by the American Bar Association, and that as a step in the direction of securing the adoption of such standards, the association should favor the imme-

diate adoption of an amendment to existing laws requiring, in addition to present standards, graduation from a high school or such preliminary education as is necessary for admission to the first year of the State University in the Department of Letters. This was adopted. The recommendation of the Section of Courts and Judicial Officers that the legislature be vested with power to fix the salaries of justices of the Supreme Court and District Courts of Appeal and other courts of record, was approved; also a recommendation of the Section on Criminal Law Enforcement that the legislature create a commission to study the causes of crime and the most adequate means of prevention, restraint and rehabilitation, and to report its findings to that body.

The following officers were elected for the coming year: President, Jeremiah F. Sullivan of San Francisco; vice-presidents—George F. McNoble of Stockton, John G. Mott of Los Angeles, Charles A. Shurtleff of San Francisco; treasurer, Delger Trowbridge of San Francisco; secretary, Thomas W. Robinson of Los Angeles. Executive Committee—Eugene Daney of San Diego, H. C. Wyckoff of Watsonville, F. M. Angellotti of San Francisco, Thomas C. Ridgway of Los Angeles, and Charles A. Beardsley of Los Angeles. A brilliant banquet closed the activities of the association. Members in attendance were deeply appreciative of the excellent arrangements for their comfort and entertainment provided by the San Joaquin County Bar Association.

IOWA

Educational Standards of the American Bar Association Indorsed at Annual Meeting

The Iowa State Bar Association held its twenty-ninth annual meeting at Mason City, Iowa, on June 21 and 22. The attendance was the largest in the history of the Association, the registration being over 550. The four meetings and banquet were enthusiastic gatherings, the program was well chosen and the meeting was the most successful in the history of this active organization. The Mason City bar provided splendid entertainment for the lawyers and ladies in attendance, the luncheon at Clear Lake on Friday being especially enjoyable.

The unsettled and turbulent conditions of government policy and recent attacks upon the Judiciary formed the basis for much of the discussion and the papers read before the Association. Mr. R. E. L. Saner of Dallas, Texas, Chairman of the Committee on Citizenship of the American Bar Association, delivered an eloquent and inspiring message in his address taken from the text, "Remove not the ancient landmarks which thy fathers have set," Prov. 22:28. The inspiration arising from this splendid presentation of the duties of American citizenship resulted in the Association authorizing the appointment of a special Committee of American Citizenship, with an appropriation of $1,000 for its activities.

A subject which had provided many lively debates in the past was finally settled when, after an hour's heated discussion, the standards of the American Bar Association for admission to the bar were endorsed by the Association. The sentiment of the Association was never in doubt, but the opponents of the resolution of endorsement used very skillfully the arguments which had resulted in the defeat of the resolution at three previous meetings.

The Committee on Law Reform submitted seven proposed changes in the law with the result that two were indorsed, three rejected and two referred to the Legislative Committee for further action. A splendid paper was read by former Congressman Burton E. Sweet on the subject of "Render unto Business the things that pertain to Business, and unto Government the things that pertain to Government." The speaker stressed the need of division between purely governmental functions and the present-day usurpation of business activities by government and found a ready response from the audience. The address of the President, Hon. James A. Devitt of Oskaloosa, was an excellent presentation of the subject of "Stare Decisis," which was greatly appreciated by an interested audience.

The Association was particularly fortunate in having as its guest Senator James Hamilton Lewis of Chicago, who delivered the Annual Address on the subject of "America as Author of New International Law." This brilliant and splendidly delivered address was enthusiastically received by the Association and gave the members a new and deeper understanding of the condition of modern International Law. The broad experience and keen insight into international relations which Senator Lewis possesses made it possible for him to impress his listeners with the gravity of present international conditions.

The report of the Secretary-Treasurer showed the Association to be in splendid financial condition and announced that the membership has passed the 1400 mark. Des Moines was chosen as the place of the next annual meeting and the following officers were elected: President, Chief Justice Truman S. Stevens of Hamburg; Vice-President, A. Hollingsworth of Keokuk; Secretary-Treasurer, Clyde H. Doolittle of Manchester; Librarian, A. J. Small of Des Moines.

CLYDE H. DOOLITTLE, Secretary.

KANSAS

Plan of Organization of State Association and Legal Education Among Important Matters to Come Before Annual Meeting

The forty-first annual meeting of the Kansas State Bar Association will be held in Kansas City, Kansas, on the 26th and 27th of November, the Monday and Tuesday immediately preceding Thanksgiving. This date has practically become a fixed date for the annual meeting, due to the fact that the various district courts of the State practically discontinue the hearing of any matters during this week, and this enables all of the lawyers who care to attend to do so.

At the same time, the annual meeting of the Judges of the State will be held. While the plans for the meeting have not been fully completed, arrangements have been made for Honorable J. Hamilton Lewis of Chicago to address the Association at its meeting on the evening of November 26th. Mr. W. F. Dickinson, General Solicitor of the Rock Island Railroad, will speak on the morn-

ing of November 27th, while Senator James A. Reed of Missouri will be the principal speaker at the dinner to be held on the evening of the 27th. Honorable Rousseau A. Burch, Justice of the Supreme Court of Kansas, will address the Association on "The American Law Institute" on the afternoon of the 26th.

Matters of considerable importance will come before the meeting for action. It is expected that some steps will be taken to change to a very considerable extent the plan of organization of the State Bar Association. The matter of legal education will again come before the Association in an effort to try to place Kansas on record as one of the states that is adopting the standards of legal education as set by the American Bar Association. A final report of the Commission to Revise the General Statutes will be made, and the complete work will be presented. Senator F. Dumont Smith, Chairman of the Americanization and Citizenship Committee of the State Bar Association, will present a report, and it is expected that the work of the American Bar Association will be supplemented by the activities of the State Bar Association. The Committee on Citizenship of the American Bar Association will have an active medium through which it can get in touch with all the lawyers in the State more readily than it can with the individual lawyers.

MICHIGAN

State Bar Association Declares for Self-Governing Bar and Appoints Committee to Push Measure

An incorporated and self-governing bar was strongly urged in a resolution passed at the recent meeting of the Michigan State Bar Association, held at Grand Rapids September 7 and 8. A committee is to be appointed to push the bill for incorporating the bar, thus giving it control of the admission and discipline of its own members. This committee will be charged with the further task of informing the lawyers of the state of the plan in order to secure united support. The resolution came after Mr. W. W. Potter of Lansing had delivered a strong address pointing out the unorganized character of the bar in the state and urging that action be taken to remedy the situation.

"The creation of an integrated bar," said Mr. Potter, in advocating this step, "ballasted with responsibilities and winged with actual power, will make for more conscientious individual lawyers, and will be of great importance to the state and to society. The system is in force in Great Britain and in Canada and for years has worked well in both countries. The Bar Association of this state and of every state in the Union ought to be in possession of the powers and charged with the responsibilities which belong to the bar at common law."

The program included a presentation of the two sides of the question, "Less Than Unanimous Verdicts," by Mr. Paul Howland of Cleveland, Ohio, and Mr. Stewart Hanley of Detroit. Mr. Howland spoke of the successful operation in Ohio, since 1913, of the law which provides that the votes of nine out of twelve jurors may render a verdict in civil cases. He maintained that the verdicts were more uniform, the number of disagreements had decreased, and the profession of the jury-fixer had been practically destroyed. Mr. Hanley, on the other hand, contended that the change would not result in a greater measure of justice. General dissatisfaction with the administration of law was the reason for the agitation in favor of it, and intelligent people, groping about for a remedy, had concluded the fault lay with the jury. This was largely true, but what was really needed was a different method of selection which would give a better class of jurymen. This presentation was followed by a general discussion.

Other features of the program were a discussion of Legal Aid by Mr. John S. Bradway of Philadelphia, and Mr. Otto Wismer of Detroit, and a paper by Mr. Mitchell D. Follansbee of Chicago, on professional standards. The presidential address was delivered by Mr. George E. Nichols. During the proceedings Mr. John B. Corliss, of Detroit, asked the support of the Association in connection with the efforts of Detroit attorneys to bring the 1925 meeting of the American Bar Association to that city. He stated that a committee would be appointed to extend this invitation at the 1924 meeting of the American Bar Association, to be held on the Atlantic seaboard and in London. The banquet was made notable by the presence of Associate Justice Edward T. Sanford of the United States Supreme Court, who delivered an address. The arrangements for recreation were much enjoyed.

The following officers were elected for the ensuing year: President, George W. Cook, Flint; Vice-President, Walter S. Foster, Lansing; Secretary, Edson R. Sunderland, Ann Arbor; Treasurer, William E. Brown, Lapeer; directors, Oscar C. Hull, Detroit; Clark E. Baldwin, Adrian; H. Claire Jackson, Kalamazoo; Philip T. Colgrove, Hastings; Fred A. Maynard, Grand Rapids; J. Frank Wilson, Port Huron; Charles W. Nichols, Lansing; F. O. Eldred, Ionia; A. A. Keiser, Ludington; J. E. Duffy, Bay City; Sherman T. Handy, Sault Ste. Marie; Arthur H. Ryall, Escanaba, and Stewart Hanley, Detroit.

The Special Meeting in London

"It will be a matter of great pleasure to the whole Profession to hear that the American Bar Association has unanimously decided to accept the invitation to hold their meeting in this country next year. At the same time the Canadian Bar Association will also be with us, and will act as joint hosts in the reception of our American colleagues. The incidence of the American vacation will enable the meeting to be held in July before the closing of the courts and at a time when all the members of both branches of the Profession will be available to receive our distinguished visitors."—*The Law Times, Sept. 22.*

The Populace in the Court Room

"A notion is abroad, encouraged by the pernicious system of 'trial by newspaper,' that the populace are the ultimate tribunal in cases that excite their attention. Never, indeed, was there a time when it was more necessary that the decorum of the Courts should be preserved. Judges, in addition to exercising their power to 'clear the Court,' might firmly remind some of the most conspicuous offenders of their inherent power to treat these unbecoming demonstrations as contempts of court."—*The Law Journal, Sept. 22.*

LEGAL ASPECTS OF FOREIGN TRADE

By GUERRA EVERETT

Chief, Section of Legal Information, Division of Commercial Laws, Bureau of Foreign and Domestic Commerce

THE daily mail of the Division of Commercial Laws brings no more persistent inquiry than that which asks whether conditional sales are customary or legal in Latin America. It is sometimes difficult to give a clear answer to this question in a single letter of reply, because, to do so, we have to explain the general statement that the conditional sale does not exist in the commercial economy of Roman law countries. In the jurisprudence of most of these, there is no such thing as the chattel mortgage, or any other such instrument having for its purpose the creation of a lien on personal property in favor of a party not having physical possession of the goods against which the lien is to run, and constructive notice of which may be charged against third parties when the instrument is recorded in a public registry.

The Roman theory is that possession is not merely nine points of the law, but the whole of it. Possession is equivalent to title to such a degree that a pledge of personality, for example, is valueless without delivery of the thing pledged. A conditional sale, accompanied by delivery of the goods, but reserving title to the vendor, is legally incomprehensible in Latin America. The motion of a *sale* of movables excludes the possibility of any condition precedent.

The familiar American "installment plan," however, is one of the exigencies of modern commerce. It is no wonder that legal acumen should discover a different sanction from the law of sales to facilitate such transactions. Latin American jurisprudence upholds the legality of a contract whereby one party gives and the other accepts the custody of movables for stipulated purposes. With this principle as a guide, the installment sale is effected through the celebration of a special contract in which the vendor (now called hirer) agrees to let the object to the purchaser (*arrendatario*), further agreeing, after a given amount of the rental has been paid, to transfer the title.

Under such a contract the vendor retains title to the object, and has at his disposal several remedies for the protection of his interest. If the object is wrongfully transferred to a third person, or if the landlord distrains for rent or creditors attach the object for the debt of the vendee, the vendor may exercise a power in the nature of replevin, called *reivindicación* in Spanish, and in Portuguese *reivindicação*. If the movable has been attached by the syndic, or trustee of the estate of a bankrupt vendee, the vendor may obtain its redelivery upon due application whenever he can identify it and prove his title. The *juicio declaratorio civil*, or action for damages, and a criminal prosecution for "abuse of confidence," equivalent to statutory larceny or embezzlement, are additional recourses against the purchaser for diversion of the property.

Since identification and proof of title are the foundation of the vendor's right to retrieve the object of the conditional sale, the seller is primarily interested in the means of assuring the establishment of these prerequisites from the start. I have said that the legal effect of a sale "on the installment plan" is to be attained by means of a special hire-purchase contract evolved by legal talent to meet the requirements of present day commerce. This document should be written in the current form and in the language of the vendee's country. It should expressly declare the relationship of the parties to be that of a *locatio-conductio*, should provide against alienation by the vendee, and should stipulate against merger of the property with that of the vendee. The rental to be paid for the property is stated, and there is a covenant on the part of the vendor to pass title to the vendee after a given sum has been paid in rent. The vendee agrees to care for the property diligently and not to challenge, or do any act that may prejudice, the vendor's title.

This document is signed by both parties. If the parties are not both in the United States, the American vendor acknowledges the instrument before a notary. The attestation of the notary is authenticated according to the requirements of the consul of the vendee's country, who will legalize it. It may then be sent to the vendee for signature before a notary in his country. The local regulations may require protocolization before the document can be registered in the commercial registry. When once registered, the contract is a public document in the nature of a confession of judgment, and estops third persons from interrupting the rights and interest of the vendor.

What has been said applies in general to all Latin American countries. Custom or law in each country has established its own criterion regarding the form, contents, and sufficiency of the contract, so that a uniform contract is impossible. A passage in a Brazilian law reads: "It is understood that in conditional sales the contract will not be considered perfect except after the performance of the condition." It is evident, in the light of the jurisprudence of the civil law, that the "conditional sales" referred to can have no analogy to the sale on the "installment plan." The conditional contract, as has been pointed out in COMMERCE REPORTS, has not been developed in Brazilian law to the extent of technical regulation which it enjoys under the English system of law. Brazilian lawyers may see in this clause an opportunity to incorporate into their law of sales a most useful principle of English law origin.

Playful But Not Guilty

"Not the least interesting feature of Judge Parry's book, 'The Seven Lamps of Advocacy,' is the frequent reference he makes to great American advocates, especially to Abraham Lincoln and Rufus Choate. Of the latter's power to capture the sympathy of the jury by a humorous phrase he gives an admirable instance. 'They were playful, gentlemen of the jury,' said Choate in an address in an Arcadian divorce case, 'not guilty. After the morning toil they sat down upon the hay-mow for refreshment, not crime. There may have been a little playful fondling, playful, not amorous. They only wished to soften the asperities of hay-making.'"—*The Law Journal, Sept. 29.*

LETTERS OF INTEREST TO THE PROFESSION

Moral Character of Bar Candidates

Chicago, Ill., Oct. 25.—To the Editor: I have read with much interest the article in the October number of the Journal on "The Moral Character of Candidates for the Bar" by the Honorable George W. Wickersham. The article contains the following statement:

> Only in Kentucky, Minnesota, Missouri, New York and New Jersey is the applicant required to furnish such proof as the committee of the bar appointed to pass upon his application or the court itself shall require.

I regret that Mr. Wickersham should have omitted Illinois from the group of states mentioned in the above quotation. I enclose a copy of a report made to our Board of Managers under date of April 5, 1916, which indicates that The Chicago Bar Association became interested in this work some time ago. The matter was taken up with the Supreme Court of Illinois and, following a conference between the court and the Board of Managers of The Chicago Bar Association, the court amended its Rule 39 by providing for the appointment of a Committee on Character and Fitness for each of the four Appellate Court Districts. The first committees were appointed at the June, 1917 Term of the Supreme Court.

The First Appellate Court District of Illinois comprises the County of Cook, in which the City of Chicago is located, and therefore the committee of the First District passes upon approximately eighty per cent of the applicants for admission to the Bar in Illinois. This committee is well established in its work, which is conducted very much along the lines suggested in the report made to the Conference of Bar Association Delegates at Minneapolis on August 28th by Mr. Wickersham's committee.

We should regret very much to have the members of the American Bar Association think that we in Illinois had not been alert in the matter of improving the moral standard of our Bar.

C. P. DENNING,
Exec. Secretary.

Comparative Judicial Courtesy

Denver, Col., Oct. 25.—To the Editor: The clipping from "Law Notes" published in the October number under the heading "Judicial Courtesy Here and Abroad," misses what I conceive to be the fundamental reason for the "more uniform courtesy" therein mentioned.

The English people, when at home, have better surface manners than Americans. They cultivate more assiduously the "social courtesies that bless and sweeten life." T. J. O'DONNELL.

Citing Mr. Weller

Boston, Mass., July 26.—To the Editor: In the famous trial of Bardell vs. Pickwick, Mr. Tony Weller called out to the Judge from the gallery that he should spell Sam Weller's last name with "a *we*." A humble member of the Bar, whose attention has been called to the cover of your valuable American Bar Association Journal, is moved to cry out, even more vehemently than Mr. Weller,—"Spell it with a U; Spell it with a U"! CHARLES E. STRATTON.

The Declaration of Virginia

Little Rock, Ark., Sept. 7.—To the Editor: On May 6th, 1776, a convention of delegates and representatives of the several counties and corporations of Virginia met and prepared "The Constitution or Form of Government Agreed to and Resolved Upon by the Delegates and representatives of the several counties and corporations of Virginia." This is the title of the instrument as printed therein.

It charges the King of Great Britain, in practically the same language as found in the Declaration of Independence, with the same abuses of the American Colonies as those set out in the Declaration of Independence. It contains the charge that he "hath refused us permission to exclude by law negroes."

A similar provision was in the original Declaration of Independence as presented to the Congress at Philadelphia by Thomas Jefferson, as chairman of the committee to prepare it. But on objections from representatives of some of the Southern States this provision was stricken out.

Who was the author of this Declaration of Virginia? Jefferson was at that time attending the Congress at Philadelphia. Did he suggest it to the Virginia Convention, or was some other delegate the author thereof?

As this is a matter of some historical importance, cannot some Virginian, familiar with the history of that State, throw some light on this question, which is of great importance to the students of American constitutional government. JACOB TRIEBER.

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LIVE TOPICS DEALT WITH BY CONFERENCE OF BAR ASSOCIATION DELEGATES

Powers of Self-Government Conferred by Statutes Upon Bars of Three States—Practical Plan Reported for Testing Moral Fitness of Applicants—Success of Conciliation Courts and Procedure in Adjusting Minor Controversies Presented by Qualified Speakers—Certain Lawyers Called False to Constitutional Doctrine

THE Conference of Bar Association Delegates is composed of representatives of the American Bar Association, of forty-eight state and eight hundred city and county associations; also representatives from the bar associations of Porto Rico, Alaska, Hawaii, the Far East and the District of Columbia. Its purpose is to supply a clearing house of information for these associations, which represent the entire profession, to serve in a measure to co-ordinate their activities, and to afford a forum for the discussion of common problems. The American Bar Association is entitled to five delegates, each state and territorial association to three delegates and each local association to two.

The Conference was called into being in 1916 by Mr. Elihu Root, then president of the American Bar Association, by authority of the Executive Committee. It resolved in this first meeting to become a constituent assembly. For three years it was represented in the American Bar Association by a committee of that association and during this time it so well justified its existence that when the revised constitution of 1919 was drafted the Conference became a section, with by-laws and a council of eight members, besides the usual officers.

Mr. Root called the first meeting to order and Mr. Simeon Baldwin, the eldest living ex-president of the American Bar Association, was chosen to preside. In the following two years Mr. Root was permanent chairman, his successors being Mr. Moorfield Storey, elected in 1919, Mr. Stiles W. Burr in 1920, Judge Clarence N. Goodwin in 1921, Mr. Charles A. Boston in 1922 and Mr. W. H. H. Piatt in 1923. Mr. Julius Henry Cohen, as secretary over the period which included the first six annual meetings, exerted a strong influence on the development of the Conference.

The late John Lowell, who was representative of the legal profession in its war activities, and was identified with the Conference, found it to be a timely and helpful ally in securing orderly co-operation in such vital work as giving legal assistance to draft registrants. The Conference normally deals with selected topics through committees, reports, and debates which materialize in resolutions which are broadcasted among the associations. The principal subjects dealt with have been anachronisms in the administration of justice, the prevention of unnecessary litigation, curbing encroachments upon the professional field by unlawful practice of the law, the selection and tenure of judges, legal ethics, bar discipline, the organization of self-governing state associations, legal aid work, conciliation courts and procedure and legal education. The resolutions of the first seven meetings have been published in a pamphlet which is obtainable through the secretary. It affords useful suggestions as to topics appropriate to the programmes of state and local associations.

Speaking broadly, the topics considered have been of a kind not appropriate to the manifold activities of the American Bar Association, so that duplication of effort has been avoided. But in legal education the Conference became an ally to the parent body after the adoption by it in 1921 of its standard educational requirements for admission to the bar. For this work it was well fitted as was proved by its special meeting held in Washington in February, 1922, when representatives of state and local associations to the number of about five hundred met and debated study requirements. The resulting report of proceedings is an arsenal of arguments in favor of the standard education, all the stronger because it contains also all that was said against them.*

Each succeeding meeting has seen a larger number of associations represented. The delegates are truly representative, many of them being secretaries or presidents of state and local associations or members of the American Bar Association General Council. The discussions are almost invariably spirited and infused with expert knowledge of conditions.

The program for the meeting held in Minneapolis on August 28, 1923, included reports from committees on judicial selection, bar organization, moral fitness of candidates for admission, and co-ordination of bar associations. The special topic was conciliation courts and conciliation procedure. The evening session was devoted to the subject of observing Constitution Week. Delegates were also allowed time to report on any matter which they deemed of common interest. The opening address of Chairman Boston summed up the history of the organization in such an effective manner that it is here published in full.

EDITOR'S NOTE: The material in this issue from page 737 to page 752, inclusive, is contributed by the Conference of Bar Association Delegates.

*Reported in Am. Bar Ass'n Report, 1922, p. 482.

The Past, Present and Future of the Conference of Bar Association Delegates

By CHAIRMAN CHARLES A. BOSTON

I propose to invite the attention of the delegates to what this Conference has accomplished, where it stands and what it may do.

It was an experiment when in 1916 Mr. Elihu Root by authority of the Executive Committee of the American Bar Association invited all state and local bar associations to a conference in Chicago.

Delegates from 54 associations attended, and this Conference eventuated, and in 1919, it became and now is a section of the American Bar Association.

Its growth is indicated by the following figures:

1916 in Chicago 54 associations, 84 delegates.

1922 in San Francisco 147 associations, 297 delegates.

Its purpose is declared to be

"To create a better understanding between the members of the American Bar and to bring about a better and more effective co-operation by the bar associations of the country in securing and maintaining high standards of character, education, fitness, ability and conduct in the legal profession and a more speedy, efficient and satisfactory administration of justice."

While this purpose is broad it relates to but two subjects
the legal profession
and the administration of justice.

There is sound reason for these limitations, because we are only a section, and *not* the American Bar Association;
and we should not invade fields reserved for the parent body or its other sections.

And there is also a limitation of method
the creation of a better understanding between members of the Bar and co-operation of bar associations.

We act therefore not directly
but upon members of the Bar and for co-operation of bar associations.

These limitations should not be lost to sight, because the Conference would obscure its purpose and become involved in ineffectual labors for which it is not adequately constituted or equipped if it should endeavor to ignore
members of the Bar
and bar associations
as the material upon whom and through whom it operates.

And, if it endeavored to act independently, it would lose the efficient aid of these agencies and relieve them of their due responsibility.

The Conference, therefore, is essentially a body for discussion and imagination and not for the achievement of the results which it recommends.

It is a body, too, for enlightening and influencing and not for spokesmanship.

It is not designed to speak for associations but to them.

Its chairman is a committee of one of the American Bar Association to report to that Association. But it cannot determine for it. The voice of the Conference is not the voice of any bar association.

Therefore, when associations send delegates, they need not fear that they will be committed. The declarations of the Conference are recommendations only.

It is gratifying, however, to note how these recommendations have been received and acted upon by the associations who have sent delegates, and that without coercive effort on the part of the Conference.

It appears to me doubtful whether any body so constituted, if we except the Constitutional Convention of 1787, has ever accomplished such results within such a period.

Omitting casual and unimportant resolutions respecting its own organization and matters of merely current and temporary concern, its recommendations in the seven years from 1916 to 1922, inclusive, may be thus catalogued in chronological order:

the fostering of legal aid societies;
the systematic investigation and elimination from the laws of anachronisms not fitted to the habit of the people;
the systematic elevation of professional standards
by evolving methods for the
investigation of the character of candidates for admission,
instruction in ethical standards,
adoption of disciplinary steps
to purge the Bar
to suppress unlawful and unauthorized practice,
co-operation among bar associations in presenting and disposing of grievances against members of the Bar;
the prevention of unnecessary litigation;
the investigation by the American Bar Association of some general system for a tribunal of Conciliation;
the creation of a sub-committee on Uniform Judicial Procedure;
the consideration of the basis of
contingent fees
and their summary review by the court;
the consideration of the incorporation of the Bar in each state;
the condemnation of the practice of law
by trust companies and corporations and laymen
and the preparation of a brief on what constitutes the practice of law;
the investigation of the field of aeronautical law;
the co-operation of the Bar in electing competent judges;
the elimination of uncertainty in the statutes for the removal of suits from state and federal courts;
the distribution of the brief of its committee on the definition of the practice of the law;
the consideration and adoption by state and local associations of the Canons of Ethics of the American Bar Association;
the consideration of the method of securing the nomination and election of fit and qualified judges:
co-operation of bar associations with the Secretary of the Treasury in ascertaining the fitness of applicants to practice before the Treasury Department;
the minimum standards of legal education;
the institution of a bar council in each state to scrutinize proposed legislation;
the consideration by Bar Associations of contributing to a fund for the promotion of proceedings and events of common interest to lawyers;
that all delegates report to their associations.

In furtherance of these recommendations the Conference has committees whose reports are expected at this meeting
on the Selection of Judges;
on Bar Organization;
on the Moral Character of Candidates for the Bar;
on Co-ordination of the Bar;
and there is an Advisory Committee on Legal Education, which was authorized and has organized, but has not functioned—
a report is expected from the Chairman of its Executive Committee.

Such have been the recommendations of the Conference; it remains for the bar associations to carry them out.

The recommendations have already been fruitful of encouraging results.

Taking them up in their chronological order these results may be chronicled as follows:

1. *Legal aid:*

The American Bar Association devoted a large part of a session at St. Louis to the discussion of this subject, and was addressed by our present Secretary of State, and by Judge Ben B. Lindsay, of Denver, and Reginald Heber Smith, Esq., of Boston.

At its meeting in San Francisco, the American Bar Association adopted a resolution requesting the Council of the Conference to take further steps in respect to legal aid; in consequence of this, the recommendation was transmitted promptly to all state and local bar associations for such action as they might respectively deem appropriate.

The Committee on Legal Aid Work of the American Bar Association has published its current report to be made to the present annual meeting. It shows very vigorous work on the part of some associations. It says:

"The progress that has been made is extraordinary. Over 30 associations have taken definite action of some sort, and among this number are included the greatest bar associations in the United States. Still other associations have the matter under consideration and presumably will act."

It adds:

"The Bar may no longer be charged with neglecting the interests of poor litigants."

It states that a year ago there were 30 legal aid organizations in the United States, and there are now 40; they extended aid in 1922 to 125,000 persons, the largest number in their history. In June at Cleveland there was a convention of delegates from organizations in over 25 different cities, and the National Association of Legal Organizations was created with Chief Justice Taft as honor-

ary President, and John H. Wigmore, of Chicago, and O. K. Cushing, of San Francisco, as Vice-Presidents.

But the committee has no information of any legal aid activity in

Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Iowa, Kansas, Maine, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming—29 states and the District of Columbia.

Let us hope that this is due less to neglect than to lack of need.

2. *Anachronisms in the law:*

Two agencies are at work which are capable of great results.

During the year, the American Law Institute was formed, and received such substantial aid from the Carnegie Corporation that its programme for the next ten years appears to be assured.

While its primary object is a systematic statement, according to fundamental philosophic principle, of American law, this should result in pointing out, and in the ultimate elimination, of that useless and vexatious refuse which ought to disappear from the body of law, and which is responsible in large measure for the injustice occasionally emerging in law.

The second agency is a commission recommended by the Governor of New York and authorized by its legislature to investigate the anachronisms in law. The recommendation appears to be in exact accord with the Resolution of this Conference, and to be its first fruits. The commission is required to report to the Legislature of 1924. It would seem that such an early report might require a hasty and inadequate and perhaps a partial survey. But it is a step in the right direction.

Judge Cardozo, of the New York Court of Appeals, one of the most philosophic thinkers on the American Bench, has suggested the institution of a permanent Ministry of Justice, which shall systematically give consideration to this subject.

Perhaps the casual effort in New York may eventuate in the adoption of a permanent agency rather than the single commission now empowered and required to make a hasty report.

Let us hope that these efforts may prompt other states to follow the example and to act upon the spirit of the recommendation of this Conference.

The Committee on Judicial Ethics of the American Bar Association in its Canons reported to be considered at the current meeting, has recognized the influence of judges upon the development of the law, and has counselled judges to promote justice; to be alert in rulings; to be useful to litigants and the community; to fearlessly observe and apply fundamental constitutional limitations and guaranties; to co-operate as members of a single judicial system; to promote the more satisfactory administration of justice; to indicate the reasons for their action; to have due regard to the great volume of published decisions; not to disregard the general law to accomplish specific results, for such departures may unsettle accepted principles; not to be extreme or peculiar or spectacular or sensational; and to contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of their observation and experience.

If judges who administer law were alert to point out its injustice, in those cases where anachronisms prevent a just disposition of controversies, they could aid materially in correcting evils of law.

For a single instance, The Supreme Court of the United States has recently adhered to the artificial rule that a court or judge is without jurisdiction to settle a bill of exceptions after the end of the term, notwithstanding the fact that the right to review long survives the term, and the universal use of stenographers disposes of the only substantial rational ground for the rule, that the judge must depend upon his recollection, and the postponement of settlement until he forgets may work injustice. Here is a most excellent illustration of a surviving anachronism; the bill of exceptions is for purpose of review, yet under the arbitrary principle thus declared to be jurisdictional, a technical right of review may be an empty form because the means of securing anything to review ceases with the end of a term.

3. *The elevation of professional standards:*

The attainment of this object is proceeding rapidly by—

the activity of committees on legal ethics;

the awakened interest of legal periodicals, law schools, courts and lawyers in specific problems of professional conduct;

the increasing activity of character committees;

the increasing instruction in legal ethics;

the increasing activity of grievance committees and the lessening indifference of courts and bar associations;

the increasing activity of committees on the unlawful practice of the law.

This Conference has listened repeatedly to statements from various bar associations on these activities and they need not be repeated now.

The functions of the Committee on Professional Ethics and Grievances of the American Bar Association were enlarged at the last annual meeting, so as to make it more effective. This effectiveness is reflected in its current report; it has acted upon complaints against non-members of the Association, by reference to state and local bar associations, and upon charges against members; it has formulated rules for answering questions submitted by state and local associations. It complains of the indifference of the Vice-Presidents of the American Bar Association who should aid it. It reports the criticism of dishonest and fraudulent lawyers by the National Credit Men's Association, and has urged the creation of committees to co-operate with the Bench in an endeavor to lessen these abuses locally.

In New York City where many of these abuses were disclosed, committees of each of the bar associations have been actively engaged in the effort to bring about a drastic reform. The Trust Company section of the American Bankers' Association has earnestly recommended reforms in the practices of trust companies constituting the unlawful practice of law; and the trust companies in New York City (to which my acquaintance is confined) appear to be observing with scrupulous care the recommendations of the section. This is very largely due, I believe, to the active co-operation of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, whose Chairman, Mr. Cohen, was long the Secretary of this Conference.

4. *Conciliation:*

The bulk of the programme in this present meeting of the Conference will be devoted to a systematic consideration of this subject, and I shall not enlarge upon it, except to invite your attention to the fact that conciliation is one of the oldest forms of judicial procedure, which reappears sporadically from time to time. It is surprising that it seems only recently to have been seriously advocated as a part of American procedure.

We of an older generation are familiar with the adjuration of Christ:

"Agree with thine adversary quickly while thou art in the way with him; lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer and thou be cast into prison. (Matt. V: 25)."

and again.

"Moreover if thy brother shall trespass against thee go and tell him his fault between thee and him alone; if he shall hear thee, thou hast gained thy brother.

"But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.

"And if he shall neglect to hear them, tell it unto the church; but if he neglect to hear the church, let him be unto thee as an heathen man and a publican. (Matt. XVIII: 15-17)."

But even in the Proverbs of Solomon it was said:

"Go, not forth hastily to strive, lest thou know not what to do in the end thereof, when thy neighbor hath put thee to shame.

"Debate thy cause with thy neighbor himself; and discover not a secret to another, lest he that heareth it put thee to shame and thine infamy turn not away. (Proverbs XXV: 8-9.)"

Governor Hadley tells us in his book, "Rome and The World To-day," that the first effort of the Roman Magistrate was to reconcile the contestants.

In the Cambridge Modern History, dealing with Napoleon, it appears that one of the first results of the French Revolution was the establishment of Conciliation as a judicial process; but when the Code Napoleon was adopted, it was determined to abandon Conciliation because in practice it amounted to coercion.

In New York, the Constitution of 1846 authorized the establishment of a Tribunal of Conciliation, but so far as I am advised, it was never established; and the judiciary article of 1869 omitted the provision.

According to common report, in matrimonial causes, in

France, reconciliation must be judicially attempted before a decree of divorce is granted.

Some recent correspondence of mine indicates that in Sweden it is used in matrimonial causes, and in Norway it is in extended use, but its efficacy is doubted by lawyers, though my correspondent indicates that by the people it is regarded with the same sort of confidence and affection as the Grand Jury among Americans.

We have, for presentation at this Conference, two papers on Conciliation in Denmark where it appears to be a substantial part of the judicial system; and you will hear about the recent introduction of conciliation of small causes in Cleveland, Minneapolis and New York City, and the wholly different system in South Dakota.

In New York City one judge of the Supreme Court, now dead, was long known as one who endeavored to bring about a settlement of every contest before him, an attitude, which I have heard bitterly condemned by lawyers who criticised his efforts as tending to defeat the accomplishment of right and justice.

Latterly, several sitting judges have been much praised in communications to the newspapers for their voluntary and successful efforts to effect the conciliation of disputes brought before them for trial.

Canon eight of the Canons of the American Bar Association says:

"Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation."

Though this is very mild counsel, I have heard its wisdom seriously questioned by one of the most prominent of American lawyers, on the ground that it is the nation whose citizens are trained to insist upon their rights, regardless of the cost, which in the long run is most sure to preserve the rights of the individual before the law.

These few suggestions will indicate that the subject of conciliation and the best means for its effective and just introduction as a recognized constituent in our judicial system is a field for fruitful discussion.

5. *Uniform judicial procedure:*

All efforts to effect uniform federal procedure at law have been defeated thus far by opposition which is explained in the report of the committee of the American Bar Association.

It seems probable that no reform in law has been more systematically or more rationally or more persistently urged with less effect. It would appear from the report that our governmental institutions still admit the opposition of one individual to outweigh the most serious efforts of a multitude.

The individual veto seems to be assigned by historians as the most potent cause of the downfall and dissolution of Poland; and it should be a matter of curious interest to our political philosophers that we have so far preserved the faults of Polish organization in our institutions.

6. *The contingent fee:*

I am not aware that any effort is being made anywhere to remedy the notorious abuses in the contingent fee.

A futile effort to do so was made for several years in the New York State Bar Association by its committee on the subject.

The Boston Bar Association in its canons of ethics declined to adopt the mild canon of the American Bar Association, and put the contingent fee on the basis where in a spirit of honor, it ought perhaps to be confined, substantially, that while a lawyer may be properly compensated out of the recovery by a client otherwise too poor to pay for services actually rendered, he should not become a speculator in his client's woes by contracting in advance for a specified fraction of the recovery.

The Workingmen's Compensation Laws have diminished in a marked degree the field of the canvasser for employment who under the guise of aiding the poor, approximated a public nuisance; but while the field has been narrowed, I am not advised that the intensity of effort has been diminished.

In answering a question (141) the Committee on Professional Ethics of the New York City County Lawyers' Association said:

"We think that the time has come for the members of the Bar in their respective states to reconsider the basis for the existing law upon the subject and to consider whether all contingent fees should not by law be made subject to summary review by a court on the application of the client."

7. *Incorporation of the Bar:*

The Conference has had repeated reports from its committee and a place has been assigned to it at one of the present sessions to present a further plea.

One of the most instructive considerations of the subject is that contained in the paper read before the New York State Bar Association at its 1923 meeting by Martin Conboy, Esq. It deals with all of the substantial features of the recommendations of our committee, and with their constitutional aspects in New York. It appears that North Dakota is the only state in the Union with an incorporated Bar, but that it has not the powers advised by our committee.

[Since the above was written Idaho and Alabama have provided for an incorporated Bar.]

8. *Aeronautical law:*

This subject has scarcely progressed in this country; where commercial aviation is far behind, largely because of the inadequacy and uncertainty of our law.

The current report of the committee of the American Bar Association is so full and adequate that I could not add anything to it if I would.

9. *The election of competent judges:*

Our programme for this meeting contemplates a committee report on this subject.

10. *The elimination of uncertainty in the statutes governing removals from state to federal courts:*

In consequence of the Resolution of the Conference, the Committee on Jurisprudence and Law Reform of the American Bar Association diligently undertook to secure a statutory change. The conflict and uncertainty arose from different interpretations in different circuits and districts of the one word "proper." The Supreme Court of the United States has recently, in two decisions (General Investment Co. *vs.* Lake Shore & Mich. So. R. R., 43 Supreme Court Reporter, 106; Lee *vs.* Chesapeake & Ohio R. R., 43 Supreme Court Reporter, 230) construed that word so as to remove the uncertainty and the disagreement; so that statutory change now appears unnecessary. It is with some satisfaction that I note that the meaning accepted by the court is the one for which I contended when I addressed the Conference on the subject, though the weight of number in the decisions of the lower courts was for a contrary meaning. The court holds that the proper federal district for removal is the one in which the suit is instituted in a state court, and that the fact that both parties are non-residents of this district, does not nullify the right of removal or deprive this district court of jurisdiction, and that the consent of the non-resident defendant is wholly unnecessary to establish this jurisdiction. It thus overrules many decisions to the contrary.

11. *The adoption of the Canons of Ethics of the American Bar Association by state and local bar associations:*

This has progressed to some extent. I am not aware of any complete list of the associations which have done so. The principles of these canons are, however, being even more widely recognized by courts and grievance committees, and in practice by practitioners, and instructors.

12. *Standards of legal education:*

We are to have a report on this subject from the Chairman of the Executive Committee of the Advisory Committee established by the Conference at its midwinter meeting in Washington in 1922.

13. *The establishment of a bar council in each state to scrutinize proposed legislation:*

This was a part of the plan for Bar organization recommended by the committee on that subject. Mr. Conboy, in his paper before the New York State Bar Association, deals especially with this recommendation, and appears to consider that the suggestion would not be well received by legislators for reasons which he states at length.

14. *A fund to promote publications:*

The most practical illustration of the possibilities of this recommendation is the very large contribution of $1,100,000 assured to the American Law Institute by the Carnegie Corporation; it is not, however, for publications generally, but only for the work of the Institute already spoken of.

15. *Reports of delegates to their own associations:*

Although the Conference last year adopted a resolution making this recommendation, and it was suggested that copies be sent to the Chairman of the Conference for his information, very few such reports were received. Some associations sending delegates are fully advised of the proceedings of the Conference, and this is best accomplished by according the delegates a place on the programme of the annual meeting of their own associations. Where this has been done, so far as I am advised, such a report is invariably made and the result is beneficial. It

seems certain that in the great majority of other cases no report is made.

16. *Uniform fees:*

At the last Conference a delegate introduced a resolution which was referred to the council.

It was in these words:

"*Resolved*, That there be referred to a committee to be appointed by the President of this Conference to investigate and inquire into the matter of charges for professional services, and to devise as nearly as may be, a general basis upon which charges for professional services may be predicated, and to adopt if the committee deems practicable a table or schedule of fees covering such usual and common services, the price of which is reasonably capable to being fixed in advance."

The council considered the resolution and concluded that it was inappropriate for the Conference to take action thereon, and no committee was appointed.

It seems to me that it would be a sad perversion of the purposes of the Conference as expressed in its by-laws for it to become a national price fixing organization. But be that as it may, it seems impracticable for a nation-wide Conference to fix rates for services when local conditions vary as they do, for instance, between New York where prices of rents and clerk hire are the highest and some other parts of the country where they are merely nominal by comparison.

As for the basis of charges, the principles are already stated in Canon 12 of the American Bar Association, through it is cautiously added:

"Not one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service. In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money getting trade."

Whatever local or even state bar associations may find themselves able and willing to do in fixing fee schedules, it seems to me that this body should not attempt to do so.

And as for any statement of principle as a basis for charges, it appears to me that any attempt to do it with more precision than is done in the Canon of the American Bar Association would possibly be impracticable.

The Future.

This report of the past and present is sufficiently long to prevent any substantial forecast of the future. The possible usefulness of the Conference is effectually illustrated by the past.

I am unwilling, however, to close without a warning that from the lawyers' standpoint the greatest present and future danger in this Republic is the disregard of the principles of liberty which were embodied in the Constitution and its first amendments.

This disregard leads to the oppression of minorities, and brings numerous ills in its train, nostrums, economic fallacies, the impairment of local self-government, multiplication of governmental management, destruction of individual independence, espionage, tyranny and cowardice.

We are not through with history, nor have we escaped the maxim that history repeats itself. We are not immune from the destructive force of false doctrines, and it is still true that eternal vigilance is the price of liberty. If lawyers do not preserve our precious inheritance of freedom, it will be lost. There never was a period in our history when so many various efforts were making upon so many plausible grounds to destroy the blessings of liberty which we received from our forefathers and ought to transmit to our posterity.

A united effort through this Conference to bring back and spread an appreciation of the blessings of self-reliant independence of the individual man would do much to restore what others are diligently endeavoring to destroy—American manhood.

During Mr. Boston's reading Mr. Chief Justice Taft arrived, having permitted the announcement on the program that he would attend one of the sessions, as is his custom. He received a hearty welcome and was called upon to address the meeting.

Chief Justice Taft Speaks

"I am strongly impressed with the activity of the bar all over the country in organizing for work in those fields for which its professional status and special experience make it most competent to advise the public, and the representatives of the public in legislative assemblies, in respect to the reform of judicial procedure so that by reason of delay or other circumstances justice shall not be defeated. I think the bar ought to convince the public that the judges are not alone in responsibility for the administration of justice, but that blame rests also upon the tendency of legislatures to limit the power of the judges to reform procedure and improve judicial administration. And the first step is to arouse the legislatures—and Congress, too—to the primary importance of devoting time to consideration of judicial reform.

"The trouble is not in the unwillingness of legislatures to do what is right. The trouble is to secure their attention, to get them to realize that the subject is one which demands their attention.

"There is a great deal of public discussion and a great deal of criticism, but when it comes to work out constructive measures, my dear friends, it needs work, and knowledge—accurate knowledge—if you are going to accomplish anything worth doing. And these problems cannot be worked out in Congress or legislatures unless there are competent committees prepared to devote all their time and ability to the solution of these very serious problems.

"Such meetings as this one—and I am glad to note that they are increasing and that the American Bar Association membership has reached practically twenty thousand—means that public attention can be secured. And when failure to act is made the basis for criticizing legislators and it affects their prospects for return to office, then the bar can get a great deal more attention than in the past.

"Nothing could be of greater importance than the union of state bar associations with the American Bar Association, because it permits of concentrating the attention of the bar of the entire country on any given subject. The American Bar Association may seem at times very remote from a state, but if there are active state, county and city organizations, which are integral and representative parts of the national organization, then it seems to me that the influence and the forward movement can be very much increased.

"And that explains why I am glad to be here—why I am glad to testify, so far as I properly may, to my deep interest in the work you are doing, and to be entirely free to submit to the freedom of discussion which your chairman has initiated, and to take his remarks home to my colleagues with all the influence that I may (or may not) have with them."

The Committee on Judicial Selection and Tenure, Chairman William D. Guthrie, presented a report which was read by Judge Irvin Barth, a member of the committee. The report, which has been sent to delegates entire, may be looked upon as a preliminary discussion of the judicial office and the opportunity for the organized bar to influence the situation where judges are elected by popular vote. The committee was continued for further investigation.

Judge Clarence N. Goodwin, chairman since 1919 of the committee charged with the subject of organization of state associations, submitted a report which showed gratifying progress since movements have arisen in many states looking to professional integration in a self-governed association which will include every practicing lawyer. Judge Goodwin was able to report that in three states the needed legislation had been secured, namely, North Dakota, Idaho and Alabama. The committee was continued.

Mr. George W. Wickersham then reported a practical plan, already in successful operation, for investi-

gating the moral qualification of candidates for the bar, the full text of which follows. This may well be read in conjunction with Mr. Wickersham's article on this subject in the October, 1923, number of the AMERICAN BAR ASSOCIATION JOURNAL.

Moral Qualifications of Applicants for Admission to the Bar

To the Conference of Bar Association Delegates:

The undersigned were appointed a Committee to consider and report to the Conference of Bar Association Delegates plans for a more thorough examination into the character and moral qualifications of applicants for admission to the bar.

The problem is one which is peculiarly confined to large cities. In the rural districts, the young men who seek admission to the bar are generally known to the court or the committee of examiners. They are the sons of well known members of the community, or the means of finding out what their general character and reputation is are easily available. In the large cities, the problem is very different. It is particularly acute in such cities as New York, Chicago, Boston, Philadelphia and other communities where there is a large alien population. The applicants for admission to the bar in those places very largely come from classes in the community who are not represented on the examining boards, and their antecedents are not such as to afford a very ready guide to their character. Experience in the City of New York would seem to afford one of the best guides to other crowded communities in dealing with the same problem.

Two of the five Boroughs into which the City of New York is divided, namely, Manhattan and the Bronx, are within the First Judicial Department. The other three Boroughs—Kings, Queens and Richmond—are within the Second Judicial Department. The First Department has been the pioneer in this work. The General Rules of Practice of the Supreme Court of the State, adopted pursuant to law on November 1, 1913, required the Appellate Division of the Supreme Court in each Department to appoint a committee on character and fitness of not less than three members for the Department, or a committee for each Judicial District within the Department, to which committee, in either case, should be referred all applications for admission to practice as attorney and counsellor-at-law, and that the committee must be satisfied from its examination,

> "that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justify his admission to practice, and no person shall be admitted to practice except upon the production of a certificate from the committee to that effect unless the court otherwise orders."

The rule continued:

> "No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such a character as justifies his admission to the bar and qualifies him to perform the duties of attorney and counsellor-at-law."

The rule further required the attendance before the committee of every applicant, who should produce the affidavits of at least two practicing attorneys acquainted with him residing in the Judicial District where he resides, concerning his character and general fitness.

In working out the provisions of this rule, there has gradually been developed a system which, on the whole, appears to be the most complete and thorough that we have found in any jurisdiction. The rule above referred to has been somewhat modified by Rule I of the Rules of Civil Practice in force October 1, 1921, pursuant to the New Civil Practice Act in force the same date, a copy of which rule is annexed to this report; but the principle of the earlier rule remains unchanged. As it will be observed, the Committee is required to satisfy itself concerning (1) the character, and (2) the fitness, of the applicant, as sufficient to justify his admission to practice. The burden is put upon the applicant to affirmatively establish, to the satisfaction of the committee, that he possesses such character as justifies his admission and qualifies him to perform the duties of an attorney. Necessarily, the applicant must come armed with a certificate from the State Board of Law Examiners that he has passed the prescribed examinations into his legal knowledge. His character and general fitness to be a member of the bar are the subject of inquiry before the Supreme Court committee. In the first instance, the names of all those who have passed the examinations prescribed by the State Bar Examiners are published in the official legal journal, so that there is an opportunity given to all persons who have any knowledge concerning these young men to advise the Committee regarding them. Each applicant is then required to answer questions put to him by the committee on a questionnaire, a copy of which is attached to this report. These answers must be made under oath, and in many instances the character of the answers to the questions, whether candid or evasive, affords the first clue to the character of the applicant. These answers are filed, accompanied by the affidavits of the sponsors of the applicant, and the character of the statements in the sponsor affidavits, and the consideration of the personnel of the sponsors is the next important step for consideration. The answers are all carefully examined and analyzed by the Chairman of the Committee. They and the contents of all affidavits filed are also briefed by its Secretary. The names of all applicants in a given class are sent to the Police Department and to certain of the large employers of labor who keep card indices of the names and record of all employees and applicants, in order that any information which they may have concerning any of the applicants may be placed at the disposal of the committee. Such information being received, is analyzed and its contents briefed, so that when the committee meets it has before it the full abstract of all papers which have been filed regarding each applicant and of all information which has been gathered for the service of the committee. An example of one of these briefs is annexed to this report. The committee also has at its disposal one or two trained investigators who carefully examine all papers filed and where any discrepancy appears or where information has been received by the committee which requires investigation, the matter is carefully looked into, and the results also put at the disposal of the committee. All applicants are then called personally before the committee and questioned with respect to all papers which they have filed in support of their application and with regard to any question which shall have arisen concerning their fitness. The appearance of the applicant, his candor or lack of candor, his explanation of any apparently derogatory fact, all are weighed in determining whether or not he should be recommended by the committee. In many instances, the application is continued for further investigation, and in not infrequent instances, the manifest unfitness of the applicant because of defective preliminary education or lack of intelligence is such that the committee withholds its certificate.

One of the most striking facts which has been developed in this system is the defective preliminary education of many of the applicants, particularly those of foreign birth, whose knowledge of the English language is far from what it should be to justify their admission to the bar. The requirements of the rules of the New York State Board of Regents are not rigid, and in many cases an applicant who has succeeded in meeting the requirements of the rules in his written papers, is utterly unable to express himself with any precision in spoken English. In no European country are men licensed to practice any branch of law with such imperfect education, such slender preparation, as in even the older States of this Union, and every year there is added to the licensed bar of America a large number of men who have neither the fitness, nor the preliminary or the professional education which justifies their inclusion among the members of a learned profession. Communities are slow to realize that an uneducated bar is a menace to the community, and that not in the interests of the bar itself, but in the interests of the community, the law should require higher standards of preliminary education and a more thorough professional preparation than that exacted as a condition to becoming an attorney-at-law. An ignorant bar is more costly to the public than to the profession.

The American Bar Association at its annual meeting in 1921 adopted a report submitted and resolutions recommended by the Section on Legal Education, in which report it was stated:

> "We are convinced that educational experience is the surest guarantee of a good moral and intellectual equipment. The completion of a high school course is now generally recognized as prerequisite to the study of law. We go further than this and advocate requiring at least two years of study in a college. Because a man has studied in a college it does not follow of necessity that he is ready for the study of a learned profession, but the probability that he is ready is very much increased."

The National Conference of Bar Associations on Legal Education held in Washington, D. C., on February 24, 1922, endorsed with certain explanations the standards with respect

to admission to the bar thus adopted for the following reasons:

"We believe that the adoption of these standards will increase the efficiency and strengthen the character of those coming to the practice of law, and will, therefore, tend to improve greatly the administration of justice. . . .

"9. We believe that adequate intellectual requirements for admission to the bar will not only increase the efficiency of those admitted to practice, but will also strengthen their moral character. . . .

The Conference declared that it endorsed the American Bar Association standards for admission to the bar because they were convinced that it is essential that the legal profesSon should not become the monopoly of any economic class, and they were convinced that no such monopoly would result from adopting these standards.

"In almost every part of the country a young man of small means can by energy and perseverance obtain the college and law school education which the standards require, and we understand that in applying the rule requiring two years' study in a college, educational experience other than that acquired in an American college may in proper cases be accepted as satisfying the requirements of the rule for equivalent to two years of college work."

We heartily adopt these recommendations.

Moreover, in our opinion no one should be licensed to practice until he shall have served at least one year's practical clerkship in the office of a practicing atorney.* He also in every case should have so affirmatively established his moral and personal fitness to enter upon the practice of the law, that a committee of representative lawyers, appointed by the court, shall certify that in their opinion he does possess such qualifications. In aid of this report, every student within a reasonable period of time, say sixty days, after having been registered as a student of law, should file with the clerk of the court before which he intends to apply for leave to practice, a full statement concerning himself, made by answering questions prescribed by the Committee on a questionnaire prepared by it and approved by the court. This questionnaire should be followed, after the applicant has completed his course and appears before the Committee for final approval, by a supplemental paper bringing the information contained in the original application down to date, and otherwise conforming with such rules as the committee or the court shall prescribe, for the purpose of fully informing the committee and the court of every relevant fact bearing upon his character and fitness. After the application shall be disposed of, if the applicant is admitted, these papers should remain on the files of the court for a certain period, say five years, and should be open to any disciplinary committee or body, in the event of complaint being made concerning the conduct of a member of the bar thus admitted.

We share the conviction of the Conference referred to in the value of personal contact of law students with members of the bar who are marked by a real interest in the younger men, a love of their profession, and a keen appreciation of the importance of the best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities. Nevertheless, we believe that much can be accomplished by the intelligent cooperation between committees of the bar and law school faculties, and we therefore urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the bar from whom they may learn by example and precept that admission to the bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service which they are bound to maintain.

August, 1923.

GEORGE W. WICKERSHAM, *Chairman;*
CHARLES A. DRYER,
WM. DRAPER LEWIS,
RUSSELL WHITMAN,
A Majority of the Committee.

Proposed Resolutions

That in the opinion of the National Conference of Bar Association Delegates, the following plan for a more thorough examination into the character and moral qualifications of applicants for admission to the bar should be recommended to the authorities of the respective States:

1. That at the time of registering as a student of law, each applicant should be required to file a sworn statement in writing setting forth the names and nationality of his parents; the date and place of his birth; the place where educated; if foreign born, when and where and how naturalized; whether or not his name has been changed; what vocation, if any, he has followed, and when and where; whether he has ever been concerned in any legal proceeding, and if so, full particulars; what education he has received, and when; and any other facts required by rule of court, bearing upon his general character and fitness to enter upon the study of the law.

2. That there should be appointed by every court having jurisdiction over the admission to practice of attorneys and counsellors-at-law, a committee of three or more practicing lawyers, charged with the power and duty of investigating the character and fitness of every applicant for admission to the bar, and that no person should be admitted to practice without a certificate from such committee that it has carefully investigated the character and fitness of the applicant, and is of opinion that in those respects he is entitled to become a member of the bar.

3. That after having passed the prescribed examination respecting his knowledge of the law, every applicant shall file with the committee on character and fitness a sworn statement bringing the information required in answer to the questions propounded in the statement required upon registration down to the date of the second statement and in addition, stating where and when the applicant has pursued the study of law; if he has attended a law school, stating what school and when, the nature of the courses required, and the degrees, if any in law received by him, and if no degree has been received, a statement of the reasons why; whether or not he has been employed in or studied law in a law office, and if so, giving a full list of the offices and the dates and nature of his employment and study in each, and specifically the name of the practicing attorney in whose office he has served any clerkship required by statute or rule of court, stating further whether or not he ever has applied for admission as attorney or counsellor-at-law in any court, and the result of such application, with full particulars, and if he were admitted to practice, how long and where he practiced, and whether or not any charges ever had been preferred against him as attorney or counsellor, and if so, with what result; and also stating any other facts required by statute, rule of court, or regulation of the Committee above specified.

4. That every applicant shall file with the sworn statement required to be made upon application for admission to the bar, the affidavits of at least three reputable citizens residents of the jurisdiction in which the applicant resides, at least two of whom shall be members of the bar, stating their belief that the applicant is possessed of the moral character and fitness required of a member of the bar, and the reasons for such belief, stating in detail what acquaintance they have with the applicant, and what opportunities they have had for forming a judgment as to his moral character and fitness.

5. That no application shall be considered unless and until notice of the time and place for considering such application by the Committee on Character and Fitness shall have been published as may be required by statute or rule of court a sufficient length of time in advance of such examination to enable any person having knowledge of the applicant to furnish the Committee with information concerning him.

6. That no applicant shall be considered unless the applicant shall appear in person before the Committee and submit to its examination, and shall produce before it such of applicant's sponsors as the Committee may desire.

7. That every applicant shall be examined by the Committee upon the Canons of Ethics of the American Bar Association or of the State Bar Association of the State in which he seeks admission, and shall disclose to such Committee a familiarity with such canons and full acceptance thereof by him as to rules of conduct, and shall further satisfy the Committee that he believes in the form of, and is loyal to, the Government of the United States.

8. That no applicant shall be recommended unless he shall furnish the Committee with proof that he has attended at least two years in a college of recognized standing, or that because of circumstances which the Committee are satisfied furnish a reasonable excuse, he has been unable to attend college, but that he has acquired an education at least equivalent to that furnished by colleges of recognized standing during first and second year courses.

9. That we recognize the value of personal contact of law students with members of the bar who are marked by a real interest in the younger men and love of their pro-

*Mr. William C. Sullivan is filing a minority report.

fession and a keen appreciation of the importance of the best traditions; and we, therefore, urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the bar, from whom they may learn by example and precept that admission to the bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service which they are bound to maintain.

Exhibit A

Rule 1. Applications for admission as attorneys.

Within the first ten days of each year the appellate division in each department shall name a committee of not less than three practicing lawyers for each judicial district within its department, which committee shall investigate the character and fitness of every applicant for admission to the bar. Each of such committees shall continue until its successor is appointed, and all applications for admission to the bar of persons residing with a district shall be referred to the committee for such district. Unless otherwise ordered by the court, no person shall be admitted to the bar without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. Such committee shall have power to prescribe a form of written statement of the applicant's experience, from which the committee may pass on his moral and general fitness. If such applicant has before applied for admission to the bar in this or any other state, the applicant shall set forth the same with the particulars thereof. If his application has been rejected or disapproved by the committee on character of an appellate division, he shall obtain the consent of that appellate division to the renewal of his application in any other department. No person shall receive a certificate from any such committee who does not satisfy the committee that he believes in the form of, and is loyal to, the government of the United States.

Each applicant for admission must present to the court where he shall apply for admission proof that he has complied with the rules of the court of appeals relating to admission to the bar. No person shall be admitted until he has proven that he is a citizen of the United States and an actual resident of the state of New York for six months prior to the making of the application. He shall specify the place of his residence by street and number, if such there be, and the length of time he has been such resident.

The clerk of the appellate division must file in his office all the papers presented and acted on by the court on each application for admission.

Exhibit B

APPELLATE DIVISION
SUPREME COURT
FIRST DEPARTMENT
COMMITTEE ON CHARACTER AND FITNESS

Sworn Statement of.....
Applicant for Admission to the Bar.
....., 19.....

QUESTIONS TO BE ANSWERED BY EACH APPLICANT

1. Give your full name, age, residence and birth place. If born in a foreign country, at what age did you come to the United States? If naturalized, state when and where?
2. When have you resided in the City of New York and when and where have you resided elsewhere?
3. State the names, residence and occupation of your parents.
4. State all the schools you have attended and between what dates.
5. Did you take a Regents' Examination? In what school and when did you receive instruction preparatory thereto? Was the examination held in that school? If not, where was it held?
6. Did you attend college? If so, state what colleges and when, specifying dates. What degrees, if any, have you received?
7. Did you attend a law school? If so, state what school and when, specifying dates. What degrees in law, if any, have you received?
8. Have you changed your name? If so, state facts fully.
9. Have you been employed in, or studied law in, a law office? If so, give a full list of such offices and state the period, specifying dates and nature of your employment or study in each. State specifically the office of the practicing attorney in which you have served a clerkship for one year continuously, either before examination by the State Board of Law Examiners or after such examination and prior to your application, as required by Rule III of the Rules of the Court of Appeals for the Admission of Attorney and Counsellors-at-law.
10. Have you ever applied for admission to practice as an attorney or counsellor in any court in any other state or country? If so, specify when and where; whether you were admitted to the Bar and if so, how long and where you practiced. If admitted, have any charges ever been preferred against you as an Attorney and Counsellor-at-law? If so, with what result.
11. Have you ever applied for admission to the Bar of the State of New York in any Department other than the First? If so, where, when and with what result?
12. Have you ever been employed in any occupation, business or profession other than the law? If so, when and where? State fully the names and addresses of all your employers, the position you have occupied and the period of such employment, specifying dates. Are such employers willing to appear before the Committee on your behalf? Have you ever been engaged in any business or profession on your own account? If so, state in detail the nature thereof, the time during which you were so engaged, where the business was located and what became of it.
13. Have you ever been a party to or otherwise involved in any legal proceeding? Have you ever testified in any legal proceedings? If so, state facts fully.
14. Give the names and addresses of the persons to whom you refer as to your character and state how long you have known each.
15. State fully the various reasons for your desire to adopt the practice of the law as a profession.
16. State in a general way your plans for the future in the legal profession.
17. Do you believe in the form of and are you loyal to the Government of the United States?

Signature of Applicant.....

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

being duly sworn, says: I have read the foregoing questions and have answered the same in my own handwriting fully and frankly. The answers subscribed by me are true of my own knowledge.

Signature of Applicant.....
Sworn to before me this.....day of..... 19....
[Applicants must answer ALL questions and sign both the application and the affidavit.]

Exhibit C

BERGHESSEN, Ruth; 23 yrs; 235 7th St, NYC; born and always lived in NYC.
PARENTS: Dr. Isadore Berghessen, physician; Rachel Berghessen, both of 105 W. 11th St, NYC.
GEN. ED.: NYC public schools to 1912. Hunter College High School. Took Regents at high school.
COLLEGE: No.
CHANGE OF NAME: No.
LAW OFFICES: Leon Abenstein, Jany 1, 1921 to Apr 30, 1921. Samuel Althus, 306 Bway, NYC, Apr 30, 1921 to Jan 31, 1922.
OCCUPATIONS: No.
LEGAL PROCEEDINGS: No.
REFERENCES: Samuel Althus, 306 Bway, NYC; 1 year. Edmond Koenig, 45 Cedar St, NYC, 20 yrs. Albert J. Sonnenschein, 146 Bway, NYC; 5 yrs.
REASONS: The profession has always interested me since it affords me the opportunity of working for the benefit of the public and of aiding in the administration of justice.
PLANS: I will associate myself with some firm of lawyers for a while and when I feel I have had sufficient experience I will set out for myself.

Acqd a yr—ltd to office contact

AFFIDAVITS: Samuel Althus, atty, knows applicant for more than one year and has employed her in his office for about a year; from office observation he can certify as to her moral character and legal abilities; she is of fine personality and of the highest conception of moral right and ethical practice; as a member of the bar she will

do her utmost to uphold the standards and honor of the profession.

Acqd 20 yrs—2 families res next door to each other—applct a companion of his children & in his house innumerable times.

Edmond Koenig, atty, knows applicant upward of 20 yrs, her family residing next door to him; he has seen her constantly from childhood; she has been in his house innumerable times and a companion to his children; he has taken interest in her studies and advised her; she is very bright, capable and intelligent and of high character and integrity; he has no hesitation in recommending her for approval; he is also acquainted with her parents, having known them upward of 25 years; they are people of repute and of good standing in the community.

Acqd 5 yrs—well acqtd with her family—close friends of her father—met her many times socially.

Albert J. Sonnenschein, atty, knows applicant personally upwards of 5 yrs., and is well acquainted with the members of her family, her father being a very close and intimate friend; he has met applicant socially on many occasions; she is of excellent moral character and appreciates the importance of the ethics of the profession; he is certain that as a member of the bar she will uphold the standards and honor of the profession.

Clkshp afft

Leon Abenstein, atty., states that applicant after the age of 18 years served a regular clerkship in his law office from Jany 1, 1921, to April 30, 1921, during which period she took no vacation; during the entire working period she was actually employed by deponent as a regular law clerk and student, engaged under his direction and advice in practical office work between the hours of 9 am and 5 pm.

Samuel Althus, atty, states that applicant, after the age of 18 years, served a regular clerkship in his law office from April 30, 1921, to Jany 30, 1922, during which period she took a vacation from Aug 6 to Aug 23, 1921; during the entire working period applicant was actually employed by deponent as a regular law clerk and student, engaged under his direction and advice in the practical work of the office between the hours of 9 am and 5 pm.

Ruth Berghessen, applicant, states that after the age of 18 years she served a regular law clerkship in the office of Leon Abenstein, practicing atty, from Jany 1 to April 30, 1921, and in the office of Samuel Althus, practicing atty, from April 30, 1921, to Jany 31, 1922, during which periods she took a vacation from Aug 6th to Aug 23, 1921; during the entire stated working periods applicant was actually employed by said attorneys in their law offices, engaged under their direction and advice in the practical work of the office between the hours of 9 am and 5 pm.

Certified copy of applicant's certificate of commencement of clerkship, dated Jany 1, 1921.

Affidavits:

SAMUEL ALTHUS, atty, states applct after the age of 18 yrs served a reg clkshp in deponent's law office at 306 Bway, com Apr 30/21 and ending Jan 31/22. During service of such clkshp applct did not take more than 2 mos vacation in any 1 yr, the vacation taken being Aug 6-23/21. During entire period of such clkshp except during sd vacation time applct was actually employed by deponent as a reg law clk and student in his law office and under his direc and advice engaged in the prac work of the office during the usual bus hrs 9-5 except Saturday when she worked from 9-1. During applct's employ in office of deponent she performed the following duties: looked up law, prepared pleadings, served pleadings and answered cases.

RUTH BERGHESSEN (applct) states after the age of 18 she served a reg clkshp in the office of Leon Abenstein, 200 Chambers St, com Jan 13/21 and ending Apr 23/21 and also in the law offices of Samuel Althus, 306 Bway, com Apr 30/21 and ending Jan 31/22. During the service of sd clkshp she did not take more than 2 mos vacation in any 1 yr, the vacation being Aug 6-23/21. During the entire period of such clkshp except during sd vacation, she was actually employed as a reg law clk and student in the offices of Leon Abenstein and Samuel Althus under their direction and advice, engaged in the prac work of the office during the usual bus hrs of the day, 9-5, except Saturday when she worked from 9-1. During her employ in the offices of Leon Abenstein and of Samuel Althus she performed the following duties: looked up law, prepared pleadings, served pleadings and answered cases.

Feb 24/22, letter to Committee from Hartman Seebold, Justice City Ct, NYC, states I record my faith and confidence in the char, qualifications and abilities of applct. For upwards of 8 yrs I have known applct and covering a period of at least 10 yrs have been closely associated with her father Dr. Berghessen. Applct's family has been living in my vicinity for many yrs and I have consequently been brought into close and frequent contact with its several members. Applct has been a companion and friend of my niece and nephews. My opportunities have been many for observing her and forming a judgment of her capacity and ideals. In my opinion applct possesses fine moral char and her reputation in the community is excellent. She apreciates the high standards of the profession and I have every confidence that she will uphold the honor, dignity and ethics of the bar. Unreservedly, I commend her to the kind and favorable consideration of the distinguished personnel of your honorable body.

(Knows her 8 yrs and for 10 yrs closely associated with her father—the two families and their relatives closely associated.)

Mch 6/22 Reply from Leon Abenstein states applct was in my employ as stated in your communication, from Jan 1/21 to Ap 30/21. As to her fitness, she did research work in the library and seemed to understand the principles of law involved in the decisions. She also attended calendars of the various courts in a capable manner and occasionally drafted a complaint and did numerous other detail work which clks do in law offices, and in all I found her quite capable. As to her character I can only speak in the highest terms. Her deportment while in my office was always most proper and ladylike, and I never heard of the slightest reflection against her good char either while in my office or since.

Mch 8/22 Letr to Judge Leventritt from Samuel Althus, 306 Bway, states I am well acquainted with applct having had occasions to meet her socially as well as in bus and I am personally acqtd with members of her family. I have had an opportunity to observe her and judge of her char and habits and have found her honorable and industrious. I am sure she will be a credit to the Bar and to the community.

Chairman Wickersham reported to the Conference that a member of his committee, Mr. Sullivan, of the District of Columbia, had dissented and offered a minority report, which he proceeded to read. The author opposed any reference to legal education and to the recommendation for one year of clerkship, contained in the majority report. Mr. Sullivan was not present, but Mr. Charles V. Imlay spoke for him, moving that both reports be recommitted to the same committee or their successors, publication to be subject to the orders of the Council. A spirited debate ensued, participated in by Mr. Imlay, Mr. Cohen and Mr. O'Donnell. The motion of Judge Goodwin to table prevailed. On the motion to adopt the report and the resolutions embodied in it, Mr. W. F. Mason, of South Dakota, protested. The resulting vote was in favor of adoption.

Committee on Co-ordination

After the noon recess Chairman Goodwin presented the report of the Committee on Co-ordination of Bar Association Activities. This committee had conferred with the committee of the American Bar Association having the same subject in hand, Mr. Elihu Root being a member of both. The report recommended that members of the General Council of the Association should be chosen by state associations at their regular meetings, and in case this was not done, or the member so chosen should not attend the annual meeting, then the place should be filled in the accustomed manner. Further, that the entire General Council should constitute the American Bar Association delegation to the Conference. The object, as the report

stated, was a change which "will result in supplementing and making continuous the contact between the state and national bodies already established by this Conference and will give the state bar associations a direct and permanent interest in the success of the American Bar Association and likewise give the latter a more vital interest in the success of the former."

A motion to adopt the first recommendation of the report, to stand as a recommendation to the American Bar Association, was opposed by Mr. Chester I. Long (Kansas) and Mr. Jesse A. Miller (Iowa) and defended by Chairman Goodwin and Mr. Mason (South Dakota), Mr. Railey (Florida). Mr. Thomas J. O'Donnell (Colorado) also made a strong plea for the proposed step toward unifying the state and national associations and proposed that the functions of the General Council should be enlarged in view of an expected growth of the American Bar Association to a body of 50,000 or 60,000 members, resulting from unitary membership with the state associations.

On the motion to adopt the recommendation that in case the proposed plan for selecting members of the General Council should be adopted by the American Bar Association, then the General Council should constitute a delegation to the Conference, and that the by-laws should subsequently be amended to effect this, there was also a lively debate. Mr. Julius Henry Cohen and Mr. Railey opposed the plan and Chairman Goodwin defended it. The motion prevailed finally on division by a substantial majority.

Having disposed of committee reports the Conference proceeded to the order of business for the afternoon session, namely, discussion of conciliation procedure and courts. The subject was introduced by Mr. Reginald Heber Smith, of Massachusetts, whose paper follows:

The Place of Conciliation in the Administration of Justice

BY REGINALD HEBER SMITH

It is my pleasant duty to open our discussion of Conciliation. I shall try only to paint a background that may enable us to appreciate more clearly the remarks of the succeeding speakers, who are authorities on the subject and who bring us evidence based on actual experience.

Conciliation comes before us apparently as a novel phenomenon. The questions that arise in one's mind suggest four lines of inquiry:

1. What is Conciliation? What is its purpose and its history?
2. What is its relation to our existing administration of justice?
3. To what extent is conciliation used at the present time?
4. What benefits can we expect from it?

1. The Nature of Conciliation

The purpose of a statute is stated in its preamble. A conciliation measure is to be considered by the British Parliament and His Honor Judge Parry, of the English County Courts, offered a preamble suggested by the following case. Last Christmas a quarrel took place between a landlord and his tenant that led to assault and battery. In court, the Judge learned that more serious violence had been prevented by an old man who interceded between the parties. The Judge asked him, "What did you do?", and was told, "I reminded them of the day and referred them to the fifth chapter of the Gospel according to St. Matthew." From that chapter, which contains the Sermon on the Mount, the Judge took these words, "Blessed are the peacemakers for they shall be called the Sons of God."

The purpose of conciliation is to secure peace. We are not discussing international conciliation, or conciliation in collective disputes between capital and labor—this needs to be underlined and kept in mind. We are considering conciliation as applied to the ordinary, everyday disputes between men, those individual controversies—contracts, debts, claims for damages, etc.—that today can be settled only by litigation in the courts.

We are resuming a discussion broken off more than sixty years ago. In the dramatic period that centers around the year 1848, new ideas were abroad in the world; many of our states remodeled their constitutions; and six of them, including New York in the east and California in the west, inserted provisions saying: "The legislature may establish tribunals of conciliation." Not a single tribunal was established, the whole idea was submerged in the swift current of affairs culminating in the Civil War. It was forgotten, but today after two generations, the subject again presses for attention by the American Bar.

The nature of conciliation makes a precise definition difficult. Conciliation is not an institution (like a court); it is a *method*. A method of procedure, if you wish, but conciliation proceedings are so informal, so flexible, and so variable that our ancient friend, Mr. Chitty, who wrote an early treatise on pleading and knew exactly when to demur to an anticipatory replication in a declaration, would indignantly say that conciliation had no procedure worthy of the name at all. Although we cannot define the method of conciliation in detail because there are no fixed details, we can state its general form and outline.

In searching for a definition, I found a sentence written by Arthur V. Brissen, for 25 years president of the New York Legal Aid Society, who knew how successfully the society had employed conciliation in adjusting many of the thousands of cases that come to its offices each year. He said:

"It brings antagonists together, inculcates the spirit of compromise and adjustment, under authority of the searching legal mind, expert in resources, yet in the persuasive and kindly attitude of a lover of humanity unselfishly seeking to render unto every one his own."

We are considering how far the method of conciliation may be utilized by the sovereign state in connection with its administration of justice, but I think a paraphrasing of those words will give us a descriptive definition that is helpful.

Conciliation is an informal proceeding by which two disputants are enabled to discuss the issue between them in private before a trained and impartial third person having the dignity of official position, representing the state, who explains to them the rules of law applicable, informs them of the uncertainty and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts. If an adjustment agreeable to the parties is reached, the official draws up a proper agreement, has it signed, and certifies it so that it may be entered in court as a judgment. There are no pleadings. There are no rules of evidence. The parties tell their stories in their own words. There are no lawyers—plaintiff and defendant appear in person.

2. Relation of Conciliation to the Administration of Justice

What is the relation of this conciliation proceeding to the administration of justice; where does it fit into our established legal institutions? Conciliation, being flexible, adapts itself to our present system in different ways, and appears in various guises, but a sound analysis reveals, I think, two distinct types of relationship:

(1) Conciliation may be carried on by tribunals acting entirely independently of the courts. Here conciliation is an auxiliary to the system of courts. The connecting link is the provision of law and that no case can be tried in the courts until first an attempt at conciliation has been made.

(2) Conciliation may be employed by the courts themselves. In this case, conciliation becomes a new piece of equipment for securing justice, entrusted to the judges in addition to their duties under our traditional system of litigation.

If we can keep these two types distinctly in mind, it will clarify the later discussion; but it is far more important to note that in both cases conciliation serves and aids the administration of justice. There is much confusion and misunderstanding on this point. There is an idea that the plan of conciliation is hostile to and irreconciliable with our common law system of securing justice. It is not difficult to see what causes this mistaken conclusion.

Conciliation is the way of peace, while litigation, which grows out of the ordeal by battle, still represents the idea of conflict. The salient features of conciliation are the antithesis of the characteristic features of the common law trial system: privacy as against public hearings, no procedure as against an elaborate procedure, no rules of evidence as against multitudinous rules of evidence, no jury as against the

guarantee of a jury of one's peers, the absence of attorneys as against the necessity for the presence of attorneys.

If we had to choose between the two, of course, we should select the common law system which alone has the power needed for certain types of cases and persons. But because the two types are opposite it does not follow that they are alternatives, one excluding the other. In truth, they are complementary, each aiding the other.

The conciliation proceeding is used before *and only before* resort is had to litigation in the courts. Insofar as it fails, the regular work of the courts in conducting litigation remains, unchanged and unimpaired. Insofar as conciliation succeeds, litigation is avoided and the burden of the courts is lessened.

We can fix the place of conciliation in the general scheme of things, and incidentally throw further light on the nature of a conciliation proceeding, by contrasting it with a small claims court and an arbitration proceeding.

A small claims court uses very informal procedure, but it is a court of law. Its decision is based on the rules of substantive law. The defendant appears in answer to a compulsory summons. It has legal jurisdiction. Its judgment is as binding as that of any court in the land.

An arbitration proceeding is not a court proceeding. The arbitrator has jurisdiction only when the parties *voluntarily* sign a submission to arbitration. From that point on arbitration is compulsory in the sense that the award can be filed in court and is binding on both parties whether they like it or not.

A conciliation proceeding in its pure form is a voluntary proceeding from first to last. The tribunal has no compulsory jurisdiction over the defendant. The plaintiff cannot sue in the law courts without first coming before the conciliation tribunal, but it has no other power over him. It may or may not follow the substantive law. The conciliator may suggest any honorable adjustment or solution. He cannot render a decision or enter a judgment unless both parties agree to it.

The entirely voluntary character of conciliation is at once the source of its moral power and the limitation on its legal power. What if the defendant refuses to appear? Then conciliation fails. Or, if the plaintiff comes with this attitude: "I am here because I have to go through this form but my heart and mind are closed; I'll have the law on this defendant yet?" Then again conciliation fails. Likewise if the conciliator is unable to suggest a solution that commends itself to the parties then conciliation fails. Finally, if the conciliator after hearing the facts is convinced that the defendant has cheated the plaintiff, but finds that the defendant is obdurate, what can he do? Nothing. He cannot make a finding. He cannot advise the court. His lips are sealed, the conciliation tribunal is like a confessional.

After this cathechism one may think that conciliation is an Utopian dream. As practical men, concerned with the actual improvement of the administration of justice, we are not interested in a metaphysical discussion as to the inherent uprightness of human beings. As prioof that conciliation can succeed we want evidence that it has succeeded.

3. The Present Extent of Conciliation

Let us take a bird's-eye view and see how far conciliation has already been utilized.

Conciliation tribunals have existed in Norway and Denmark for more than a century. A law providing conciliation tribunals was enacted in North Dakota in 1921, and in Iowa in 1923. These are instances of pure conciliation, administered not by the courts, but by independent tribunals or officers, so that conciliation is an auxiliary to the regular court system.

Conciliation administered by courts is to be found in the small claims courts in Cleveland, Milwaukee, and Minneapolis. The procedure of a small claims court is so informal that it is easily converted into conciliation procedure. The two merge and become indistinguishable. The small claims court in Cleveland, for example, has always been called the "Conciliation Court."

Conciliation is employed by industrial accident commissions. Where cases are not automatically settled and formal hearings appear necessary, several commissions first try an intermediate informal hearing. This plan has been successful; many cases are successfully disposed of. These are not labelled "Conciliation hearings," but that is nevertheless what they are.

Domestic relations courts are more and more invoking this method. Conciliation becomes reconciliation. When it succeeds it is far more efficacious than any other remedy known to the law.

In 1917 the Justices of the New York Municipal Court, acting under power vested in them by law, issued a series of rules providing for conciliation.

In America, conciliation has been employed only in connection with limited types of cases. We have noted domestic relations and industrial accidents. In North Dakota it applies only to claims of $200 or less; in Iowa to claims under $100; in Cleveland to matters involving $35 or less. The Minneapolis Conciliation Court has jurisdiction up to $1,000. In cases under $50 it has power to enter judgment; as to cases over $50 it has no compulsory power and this pure conciliation proceeding is little used.

In the Scandinavian countries, on the other hand, conciliation plays its part in practically all types of civil cases.

While experiments with conciliation are naturally made on the little cases first, there is no logical reason why conciliation should be limited by jurisdiction or by amount of money involved. Conciliation is a *method*, and as such is applicable to other types of cases as well.

4. What Benefits May Be Derived From Conciliation

When the New York Municipal Court Justices issued their rules they said: "The conciliation system marks a new epoch in the administration of justice in this state."

In so far as conciliation proves successful certain direct and substantial benefits will flow from it. Because of its very nature a conciliation proceeding is inexpensive and is not subject to delays. Cheapness and speed are a blessing to all litigants, and a Godsend to the poor.

Conciliation prevents litigation by rendering it unnecessary, and this means less congested dockets, less pressure on overdriven judges, and ultimately a lightening of the taxpayer's burden.

Modern conditions of life engender a great deal of friction that in turn produces a mass of litigation. Disputes run all too easily into class, religious, and racial animosities and prejudices. Litigation tends to inflame and perpetuate quarrels. When the state provides conciliation tribunals it teaches the lesson of moderation, forbearance, mutual adjustment and honorable compromise. When conciliation becomes firmly established in the traditions of a people, it exerts a powerful influence for their greater happiness, prosperity, and safety.

A paper describing conciliation procedure in Denmark, where it has been in vogue for more than a century, prepared by Mr. George Ostenfeld, of Copenhagen, was read by Mr. Cohen:

Danish Courts of Conciliation

By GEORGE H. OSTENFELD, ESQ., OF COPENHAGEN.

The Conciliation Courts of Denmark have jurisdiction in every civil proceeding and it is a condition precedent to litigation that the dispute should be submitted to a Conciliation Court. The conciliation, however, is not a proper part of the real procedure.

In our old laws we have some few examples of conciliation, but the conciliation was made a common rule by an act of July 10th, 1795, which act states, that before any lawsuit can be instituted the dispute must be submitted to the local conciliation commission. Unless a suitor can present a certificate that this condition precedent of an attempt at judicial conciliation has been complied with, the law courts will refuse to hear the case.

By our new act of procedure (The administration of justice, of April 11th, 1916) this relatively old system was insisted on by the majority of the members of Parliament, and the conciliation must as a rule take place in a special Court of Conciliation.

There are different procedures in our High Courts and County Courts, and the methods of Conciliation Courts are somewhat different in those courts, which administer justice in Copenhagen and those which administer justice outside Copenhagen.

In order to make the whole system quite clear it is necessary for a moment to look at the different courts in Denmark.

They are as follows:

1. The Lower Courts of Justice (County Courts).
(In Copenhagen called: Copenhagen Town Court.)
2. The High Courts of Justice. (One in Copenhagen and two in Jutland.)
3. The Sea and Commercial Courts, sometimes acting as

a Lower Court, sometimes as a High Court of Justice. It all depends upon the size and the nature of the case.

4. The Supreme Court. We have one, which is always sitting in Copenhagen.

In order to follow the system of our Conciliation Courts it is necessary to look at our system in Copenhagen and our system outside Copenhagen.

In Copenhagen:

1. Cases which are brought before the Lower Courts of Justice (Copenhagen Town Court) for instance:

(a) cases between master and servant,

(b) libel and slander (but not when the libel and slander has been printed or written.)

(c) cases concerning alimentary allowance, and

(d) cases concerning private money affairs or property rights, when the value does not exceed Kroner 800, e. g. A. has bought some goods of B., but he will not pay. Then the case is brought before the Copenhagen Town Court, if the value or the sum agreed at does not exceed Kr. 800.

In all these cases the judges in the Copenhagen Town Court will try to conciliate, and the judge is allowed to attempt conciliation at any time during the proceedings. All these cases are heard in open courts. No special Court of Conciliation is known for cases brought before the Copenhagen Town Court, and the fees are the ordinary fees paid to the courts.

They are as follows:

From Kr. 40 to Kr. 100.....	Kr. 4.50
From Kr. 100 to Kr. 200.....	Kr. 7.50
From Kr. 600 to Kr. 800.....	Kr. 21.00

If a conciliation is not arrived at the judge will pass his sentence.

But in many cases a conciliation is arrived at, and no more fees are to be paid.

If, for instance, A. owes B. Kroner 700, an agreement will often be made between the plaintiff and the defendant. The defendant tells the judge and the plaintiff, that he, for instance, is out of work and that he cannot pay all the money at once. The judge will then ask the plaintiff whether he will accept payment by instalments, as Kroner 100 monthly until the whole amount together with costs, about Kroner 90, is paid. The plaintiff will nearly always accept, but he is of course, not bound to do so. He can, of course, demand that the judge render judgment, so that the whole amount together with costs must be paid fifteen days after the judgment has been rendered. If the defendant does not pay in accordance with the agreement or the judgment the plaintiff can at once apply to the King's Bailiff.

Cases Belonging to the High Courts of Justice

As mentioned above the methods of Conciliation Courts are somewhat different in those courts which administer justice in Copenhagen and those which administer justice outside Copenhagen. In the same way, we find the procedure within Copenhagen is simpler in the Copenhagen Town Court where small cases are heard than in the High Court.

I shall now briefly describe the methods of conciliation which obtain in the High Court of Justice in Copenhagen. The principle of 1795 that conciliation must be attempted before litigation ensues stands good in the High Court. The Special Court of Conciliation of the High Court consists of three members, a magistrate (i. e. a mayor or alderman), a town councillor and a member appointed by the Ministry of Justice. Prior to 1916 the last member was always a High Court judge, but now he must be a layman, so that the whole tribunal is non-judicial.

In Copenhagen the plaintiff and defendant need not appear personally, as they are bound to do in the country districts, but may appear by counsel or any one authorized by power of attorney. The cases are always heard in camera, and everything said or done is without prejudice to any litigation that may ensue. If as the result of a conciliation a defendant admits a debt, for instance, and agrees to pay by instalments, this agreement is entered, so that it has the effect of a judgment.

There are a few causes of action to which the principle that conciliation is a condition precedent to litigation does not apply. If, for instance, the defendant puts in a counter-claim, or where the action is on a bill of exchange, or where the action is against the supreme power of the State, or the matter is considered urgent—these are some of the circumstances to which conciliation is neither necessary nor appropriate.

Outside Copenhagen:

In every jurisdiction we have a special Conciliation Court consisting of two members. One of the members is elected by the Municipal Council, the other one by the County Council, sometimes both of them are elected by the Town Council, when the provincial town has no surrounding territory belonging to the town. Sometimes they are only elected by the County Council, when the part of the country is not attached or belonging to any town. They are elected for six years, and they cannot refuse unless they formerly have served six years.

A special Court of Conciliation is known in the country. Disagreements between master and servant while they are together, are tried and settled before one man, who is appointed by the parish council. This man has also to do with disputes arising in cases where an annual allowance or pension is reserved by one who surrenders his real property to his heir. All these cases are heard in camera.

A second paper relating also to Danish Conciliation procedure, by Mr. Axel Teisen, of Philadelphia, was read, in the author's absence, by Mr. Cohen. This was followed by the addresses of Attorney General Shafer of North Dakota, Judge Salmon of Minneapolis and Chief Justice Dempsey of the Municipal Court of Cleveland, which are presented below substantially as delivered:

North Dakota's Conciliation Law

BY GEORGE F. SHAFER, ESQ., ATTORNEY GENERAL

The matter in which you are interested is the conciliation statute enacted in 1921. Before that, for many years, North Dakota had an ineffective conciliation statute. Ever since 1895 our state had an act which provided for the election of four conciliators in every incorporated town and village. There could be no resort to the conciliators, however, unless the claim was pending in a justice court. Upon the request of a party, and with the consent of his opponent, the justice could then transfer the matter to a conciliator for a hearing prior to the return day in justice court. If then an agreement was reached the conciliator would certify that fact to the justice, who would dismiss the action. That method was wholly ineffective. So far as my experience goes the conciliators were not even elected. The statute was wholly inoperative.

But the act of 1921 has some force—is semi-compulsory. It provides that no court shall issue process upon a claim of $200 or less until the moving party has filed with the court a certificate showing that an attempt has first been made to adjust the matter before a conciliator. There are two exceptions to this requirement; when the proposed action involves a provisional remedy, such as attachment or garnishment no such certificate is needed; and the District Court may also in its discretion release the claimant from the necessity to attempt conciliation.

Under the new law the Board of Conciliators is appointed by the District Court judge, not less than six nor more than twelve in any county, and the county judge is also an *ex officio* member. Any elector is qualified for appointment, even a lawyer, but the latter shall not appear in court in any matter after having served as conciliator.

The procedure is simple. The moving party gives a conciliator a brief memorandum of the claim which he has, and the conciliator notifies the other party by mail, by telephone or word of mouth of the time and place set for a hearing. If the parties get together on that time and agree on terms of settlement the agreement is reduced to writing, signed by the parties, certified to the District Court by the conciliator, and entered upon the docket as a judgment. But if one of the parties absents himself from the hearing, or no agreement is reached, then the conciliator will give to either party a certificate of non-conciliation which will enable the latter to obtain process in a court. No rules of evidence are enforced. No particular procedure is followed. No testimony is taken down and thereafter nothing that any party or witness says or that the conciliator hears may be admitted as evidence in a subsequent suit.

The law has been in operation but two years. So far as my knowledge goes, part of that being obtained from personal experience in a law office, in most cases conciliation is not effected in claims which would ordinarily be the subject of litigation. Most cases that would be sued, at least in my part of the state, arise from contract relations. So, if sued the action is subject to the provisional remedy of garnishment, and in some cases attachment, so frequently the moving party garnishees a creditor or attaches property, and escapes the operation of the law. And then, in many tort

cases it is the practice of lawyers, if they find it absolutely necessary to bring suit, to apply to the District Court for an order relieving them of the necessity of attempting conciliation, and as a general rule the order is entered as a matter of course. So that I think that in actual experience in our state the results have not justified, or at least have not come up to, the hopes and expectations of the authors of the measure.

However, a conciliator in the city of Fargo not very long ago told me that very small claims were frequently adjusted and settled before him as conciliator, but as a rule, he said, conciliation was a matter of form; the party cited in paid no attention to the notice, and the certificate of non-conciliation was issued forthwith.

The only question that has been before the Supreme Court relating to the act was that relating to constitutionality, and the law was sustained.

The only compensaton for the conciliator is a small fee which the moving party must pay; in claims less than $10 it is twenty-five cents, in larger claims, fifty cents; but when conciliation is effected certain additional fees are allowed.

Minneapolis Conciliation Court

By JUDGE THOMAS H. SALMON.

During the legislative session of 1917 there was a great demand on the part of lawyers and others in this city to have some means provided by which all small causes could be disposed of rapidly. We were constantly harassed by men on street corners telling of the imperfections of the judicial system; how it was impossible for a poor man to get his matter before a court; and, as a matter of fact, it took a year to do so. We had abolished the justices courts years before because of the storm raised over the fee system, and we had the Municipal and District Courts to handle the flood of cases. The poor could not afford to wait a year to have their wages paid or claims adjusted, so that justice was practically denied them, and the worst of it was that we were constantly getting further behind. The legislature had refused finally to allow more judges and business was expanding and the city growing.

After studying the situation a bar committee devised a combination of the small claims and conciliation court and the legislature passed the bill and established what it called the Conciliation Court. It was provided that up to $50 a claimant could file his claim with the clerk who would send a brief notice of the same to the defendant, notifying him of the day set for hearing, not more than ten days distant. The defendant, it was found, was sure to attend. With perhaps a hundred cases a day on the calendar, the clerk would call the cases and the parties would advance to the bar where each would tell, in his own language, his side of the matter, and if necessary, witnesses would be heard. Usually in from five to eight minutes the judge would get the entire case and then would say: "Well, I think this ought to be thus and so," and a judgment would be entered accordingly.

Then the question of the jury, under the constitution, was raised. The law provided that a party dissatisfied could appeal to the higher court and there have a jury trial. The procedure on appeal was easy. One had only to serve notice. At the beginning a bond also was required, but the Supreme Court held that that was contrary to the constitution, being in effect a restriction upon the free right to a jury trial.

At first appeals were so frequent as to threaten the success of the experiment. Then we found that if, for any reason, the plaintiff failed to get judgment for his entire demand some such conversation as this would be heard by the clerk: "Aha, you didn't get all you expected to, did you? You couldn't fool the court with your claim for $45; you only got $44, and I am willing to pay that. So in many cases we assumed the reduction of the claim, if only a few cents. I will admit that to the technical lawyer that looks as though it were not complete justice, but the party who gets his claim minus a few cents in the collection of it has not very much complaint to make.

I am not now on the Municipal Court bench, but in the District Court, and this morning I went to the clerk of the Conciliation Court and obtained this memorandum: The court began in August, 1917; number of cases heard by the court to and including August 20, 1923, 37,174; number of cases in which payment was made prior to hearing, 5,731. Now here is what I take pride in—and I attribute it to giving the losing party a chance to save his face—the number of appeals during the whole period of six years was only 735. So I think you will agree with the citizens of Minneapolis that the Conciliation Court has been a great success. In the hands of my successor very, very good work is being done. And its jurisdiction has been increased from $50 to $75.

It should be remembered that the court has jurisdiction up to $1,000, but above $75 (formerly $50) the judgment rests upon the assent of both parties. This meant that I could not often use the procedure in the larger cases, because the moment the court indicated its decision, the party who was defeated would refuse to acquiesce by signing.

I submit to you lawyers and judges in the large cities, where doubtless you are swamped with litigation, where it seems that you can never catch up, that this has been for us an ideal way and I do not hesitate to recommend it. For cleaning up the small cases, you can readily see that if a judge can dispose of 100 to 125 cases a day, as I recollect it, there is a great saving.

You can have lawyers in these cases, or not, and it is easier, I think, with lawyers because they grasp the points in the case. And if they know, not only what to say, and how to say it, but also when to stop and sit down, they are well qualified to practice law.

Conciliation in the City of Cleveland

By CHIEF JUSTICE DEMPSEY OF THE MUNICIPAL COURT OF CLEVELAND.

When the Municipal Court of Cleveland was established in 1912, the creative act authorized the judges to adopt rules relating to matters of practice and procedure. As a result, we have service of summons by mail, which you can imagine is a great saver of time and expense when the volume of business is considered. General denials in answers are forbidden, so that when a case comes to trial the issues are clear. The constitutonal right to a jury trial is not denied, but a jury is deemed to be waived unless demanded in writing on or before Call Day, which is two days after answer day. A demand for a jury calls for a jury of six, unless a demand for twelve is expressly made.

Statistics show that juries are only demanded in about ten per cent of the cases that are filed. When we consider the time consumed in the average jury case, in impanelling and charging a jury, receiving the verdict, long arguments and other formalities incidental to a jury trial, we can appreciate the time and expense that is saved in eliminating the jury in 90 per cent of the cases and limiting the number of jurors to six in at least 90 per cent of the cases in which juries are demanded. Very seldom is a jury of 12 demanded.

Not the least important rule adopted by the court was the establishment of the Conciliation Branch. The clerk of this branch of the court is a lawyer who has had about fifteen years' experience in the public service in connection with offices of the clerks of both city and county courts. People with claims involving an amount not to exceed $35.00 are privileged to consult him. If the complainant's claim is without merit, he or she is promptly advised to that effect. If it has merit the clerk endeavors to get in touch with the adverse party and adjust the matter. If unsuccessful, the case is docketed and the parties are required to appear in the Conciliation Branch of the court on a day certain. On the date fixed, the judge hears the matter and if the parties are unable to agree, renders the proper judgment.

It will be observed, therefore, that the term "Conciliation" as applied to the court itself is perhaps a misnomer, for the reason that when the parties allow a matter actually to come to trial it is usually necessary for the court to render judgment. Conciliation is a comparatively easy matter if the facts are not in dispute, but in practically all these cases that reach the judge there is material controversy over the facts and neither party, as a rule, is willing to sacrifice what he or she regards as the principle involved, and if the clerk has been unable to conciliate them each side is generally ready "to do or die."

The plaintiff, of course, is not represented by an attorney and usually neither party is represented. If the plaintiff has an attorney the case is required to go on the regular docket. The hearing, of necessity, is more or less informal and without regard for strict rules of procedure which would otherwise obtain. Therein lies the danger. If such a court is conducted as a branch of a court of record and is properly systematized and presided over by a competent judge in whom is combined the qualities of legal ability and patience, it serves a useful purpose. On the other hand, if it is not properly organized and presided over, it is likely to destroy the fundamental principles of justice and its administration, for the reason that the salutary rules of law and evidence designed for the purpose, among other things, of limiting the scope of inquiry and testimony to competent, relevant

and material matters with a resultant saving of time of the court and incidentally undue expense to the taxpayers, will be disregarded, and in time such a court will become a veritable Bedlam, unchecked by rules—not even those popularly known as the "Marquis of Queensbury."

We are fortunate in Cleveland in that the clerk who interviews the parties in the first instance and attempts the conciliation is exceptionally well qualified, and the court itself is presided over by one of the regular judges of the Municipal Court. Some statistics may be interesting:

The clerk, in going over approximately 850 cases filed during the period of about two weeks found that they were divided as follows:

26 by physicians, dentists and lawyers, for professional services.

23 for board and lodging.

194 for work and labor.

111 for damages to property.

40 for rent.

452 on accounts for goods sold and delivered (meats, groceries, dry goods, etc.).

During the same period 260 cases were found by the clerk to be without merit and 449 were settled by him without being placed on the docket.

It can well be imagined that among the great conglomeration of individuals who consult the clerk, and the facts developed, comedy is interspersed with tragedy. Many of the complaints grow out of back fence arguments and other equally humorous incidents. The comedy is not always eliminated before a case reaches the trial stage and in fact sufficient comedy is provided during a session of the Conciliation court to furnish material for a successful vaudeville program.

To give you an idea of the nature of a large number of the grievances taken up with the clerk, I will call attention to a few:

Recently one of the gentler sex survived an operation at a local hospital. Upon recovery to the extent that she was able to indulge in substantial food, she discovered that her "store" teeth were missing. She consulted the clerk in the Conciliation Court, who in turn took the matter up with the hospital authorities. They advised the clerk that they would have no use for the teeth, as each of them was fortunate in possessing good natural molars, hence there would be no motive for wrongful detention; however, the clerk induced them to permit her to choose her dentist and have a new set made, the expense of which they paid. The gratitude of the complainant knew no bounds.

A middle aged lady called at the clerk's office one day complaining that she had purchased a canary, represented to her to be a male, the cost of which was $7.00. The price quoted for females was $2.00. It later developed that the bird purchased by her was a female. It was also represented to her that the bird would sing in a short time, but that quality was missing in this particular bird. Having found an egg in the cage, she brought it along as evidence. The seller ignored the clerk's letter, with the result, that the case was placed on the docket and judgment was rendered for the plaintiff for $5.00, to her immense satisfaction.

During the tide of colored immigration from the South, Rastus and Minnie King moved to Cleveland from Georgia. Minnie's mother also lived with them, but died a short time after her arrival in Cleveland. Relatives in Savannah took up a collection and purchased a tombstone and sent it to Cleveland. In the meantime, Rastus was out of work and became unable to pay rent. A notice to vacate was served and duly obeyed by Rastus and Minnie. Rastus and Minnie moved one load of household goods and upon their return for the balance, found that the landlord had taken possession of the tombstone and was holding it as security for the rent. The landlord was summoned by the clerk and upon being advised that his action was unlawful, he experienced a change of heart and delivered the tombstone to the cemetery and had it set up.

A young man in the contracting business secured a contract to construct a driveway. He had a description of the premises, but had not seen them. The driveway was constructed upon the premises which tallied with the description, but it later developed that they were not the premises of the customer. The matter was adjusted by the clerk, and all parties were satisfied, by the person who received the benefit paying a reasonable price therefor.

A woman of foreign extraction was victimized by a so-called healer. He procured $21.00 from this woman upon representation that he could cure her of some ailment with which she was afflicted. After the $21.00 was paid he failed to return. One bright morning the woman saw a huckster wagon with a fine horse attached thereto and recognized the huckster as "Mike, the Healer." She stopped him and asked for the return of her money, which was refused, with the remark: "Here is your money," pointing to the horse and wagon. Mike ignored the clerk and upon trial judgment was rendered against him for $21.00.

The original purpose of the court was to provide a means for poor people to collect small claims without being required to engage an attorney. While it serves this purpose, on the other hand, from the statistics which I have given it will be observed that more than one-half of the 850 cases filed were suits by merchants upon accounts. A large number of cases represent claims for damages growing out of automobile collisions. We are seriously considering the advisability of consigning all cases to the Conciliation Court in which the amount involved is $100.00 or less.

Courts of Conciliation are not peculiarly American institutions. They were instituted over 100 years ago in Denmark and Norway. In every city, parish and village of twenty families or more, a duly elected Conciliation Board, composed of two citizens who are not lawyers, meets on fixed dates and settles disputes coming before it.

In France, in all cases coming before the Juge de paix, the parties are required to submit to an attempted conciliation before the case proceeds to trial. There is in this country a growing tendency towards courts of arbitration, especially in industrial disputes, and some of our cities have established conciliation courts somewhat on the order of the Conciliation Branch of the Municipal Court of Cleveland. As I have already stated, they serve a very useful purpose if properly organized and presided over, but they are dangerous instrumentalities without these safeguards.

Our trial courts should be placed on a higher plane and the best lawyers with judicial qualifications should be procured for their administration because it is in the trial court that the average litigant obtains his first and last impression of the administration of justice, and if such courts are presided over by able and conscientious lawyers, reversals and remanding by reviewing courts, with the attendant dissatisfaction and delay, will be less frequent.

The demand and necessity for simplification of procedure and fixing of individual responsibility upon the courts, is becoming more insistent and it is up to the legal profession to see the handwriting on the wall and take the initiative.

Mr. Justice Edgar J. Lauer, of the Municipal Court of the City of New York, unable to attend, submitted a paper on conciliation procedure which was read by Chairman Boston.

Mr. Hollander, of New Jersey, moved that a committee of five be appointed to consider and report on the methods of conciliation and a general plan for small claims and conciliation tribunals. On this motion Mr. Ailshie, of Idaho, spoke as follows:

Perhaps I come from the only State having no large cities which has created by statute a small creditor's court. Our legislature, at its last session, created a court or procedure very similar to that presented by Judge Salmon. Though we have no cities larger than 30,000 population yet we have a great number of laborers in mines and lumber camps and mills. We labored with the State Bar Association for two sessions to gain endorsement for this measure to enable the laboring man to go into court and, in an informal way, present his claim. A large proportion of these workers are unmarried; they come to a place and work for a time and then move away. Or possibly the mill or camp is closed down and they have to seek jobs elsewhere. Now, they cannot afford to wait for the usual processes of court to collect their claims.

At the last session we got the legislature to enact a small claims procedure. It has been used quite generally by laboring people and by merchants and has proved very successful. We limit its jurisdiction to fifty dollars, which is probably too low, but that is a detail to be taken care of later. So I say to those who have come from States that have no large cities that we find this simple and prompt procedure very beneficial in our country, where we have a great many I. W. W.'s and others to whom the speaker referred who raise an outcry against the courts. It gives them a speedy means to obtain justice.

The proceedings take place in an informal way. In my judgment there is nothing that more raises the ire of that class of people who cry out against the administration of justice than to have something which they deem very impor-

tant excluded from the testimony. Now, under the new practice, the witnesses are allowed to tell the court what they feel that they should. It may have no influence and often should not, in the opinion of the judge, but the parties and witnesses get it out of their system. They are able to tell the court what they know and also what they think. And they go away thinking it a great court, a great place to administer justice.

There is a great deal in having witnesses satisfied and having them feel that they are seeing justice done, and, in my experience, covering a third of a century in the courts, I have found more dissatisfaction among the laboring people, the poor people, by reason of procedure in the court room than from any other reason. After hearing attorneys wrangle about the admission or rejection of testimony they leave more dissatisfied with that than with losing their cases. In other words, they think that the technical ruling was the cause of their defeat. Now I submit to you that this informal method of hearing these cases, allowing everything to come in, letting them tell their story just as they have it, results in giving them a sense of satisfaction because they have had a fair hearing.

I like to endorse what has been said about the bringing to bear of ordinary horse sense. We must employ all we know of human nature as did old King Solomon when he proposed to divide the child; we must let the losing party leave feeling that he has won some point, that he was at least in part right in his contention, and when he leaves satisfied we have accomplished a great deal. He has been brought to justice, but feels that he was partly right, too, that there was some merit in his refusal to pay that claim, and he feels better about it. It is adapting procedure to human nature to cut out the technical rules in such cases and getting at substantial justice. In my opinion it is a proper thing to take advantage of an understanding of human nature in administering justice between these people.

Evening Session

The evening session began with reports from delegates who had signified a wish to be heard. Mr. Dale P. Stough reported for the Lancaster County Bar Association, Lincoln, Neb., that it had secured passage of a bill to create a municipal court for Lincoln to begin in 1925. "I am taking the time of the Conference," said Mr. Stough, "to mention this fact because it furnishes one concrete illustration of the thought conveyed to us today by the Chief Justice of the Supreme Court. Mr. Taft, that the bar associations should get behind plans for judicial reform and impress legislators so forcibly that they will secure results."

Mr. Wilson M. Powell, treasurer of the Association of the Bar of the City of New York, told how his association had so arranged its work as to become of daily practical use to its members. An employment bureau has been established which in the past year has placed 150 lawyers in positions with salaries ranging from $1,000 to $10,000 a year. The department is self-supporting. There is also a stenographic bureau with skilled operators where work can be done in a hurry. In one instance the record of a case was sent by special train from a western state and 26,000 pages of transcript were produced in seventy-two hours. At present the classifying of members according to their special kinds of practice is being done, so that when the association is asked to recommend a lawyer for a particular case it can submit the list of members active in work of that particular kind.

In the last two years an associate membership has been established which permits a lawyer anywhere in the United States to become a member with all privileges and rights except that he cannot vote for officers. This class pays annual dues of ten dollars. A nonresident member can secure from the Association, when in New York, a room in its building, a telephone, a stenographer, use of the library and, in fact, everything necessary to practice law, except clients. As to that, Mr. Powell said, he can be put on the classified list and take his chances. Reference was also made to the Francis Lynde Stetson bequest of a fund to endow a bed in a hospital for free use by members of the association.

Mr. Roy F. Hall (Rockford, Illinois) told of the success of the federations of local bar associations evolved in the past few years in the seven supreme court districts of his state under the guidance of the Illinois State Bar Association. The district association meets annually and sometimes has as large an attendance as the state body. It proves to be an effective way to get state association matters discussed by a large body of local lawyers and of stimulating the growth of both the state and American associations.

Mr. E. W. Britt reported that the Los Angeles Bar Association had increased about twenty per cent in the past year, to a total membership of 1,226. Its grievance committee comprises two sections, each of which meets weekly. It has sufficient material to work on, owing to a tendency on the part of nomadic lawyers to settle in Los Angeles.

A recent statute in California provides for instruction in the public schools on American fundamentals and the Los Angeles Association supplies the local need by appointing members to lecture in the schools. This is done in co-operation with the school board.

Mr. M. H. Loomis reported that the Omaha Bar Association had adopted the practice of weekly luncheons and had found them a means to stimulate the activity of the association, which is now full of life. This method may be recommended to other associations which appear to need inspiration.

Mr. Justice Finch spoke of the activity of the New York City Association of the Bar in respect to grievances. Eight thousand complaints are handled each year. The work is under the direction of a competent, salaried attorney who devotes all of his time to it. The text of a resolution to be later introduced at an American Bar Association meeting was read; it provided for creating a national committee on Judicial Ethics and Grievances, to which members having improper judicial conduct to report could turn.

Mr. Lee Douglas, of Nashville, reported for the Tennessee State Bar Association. A year ago this association was invigorated and has since enjoyed a healthy growth and a very successful meeting. Arrangements were made for intensive work during Constitution Week. A committee on Uniform State Laws has been created. And the Nashville Bar Association has succeeded in having instituted a legal aid bureau, which is functioning admirably, and is actively fostered by the local Chamber of Commerce. Mr. Douglas also read a resolution adopted by the state association to express confidence in the United States Supreme Court and to warn against the danger, whether from loose criticism or designing proposals, of undermining public confidence in that court or in its members.

Mr. Robertson, of Hawaii, being called upon specially, said that he intended upon arriving home to wake up the bar association with a view of making it more active and more useful as a community institution.

Mr. E. S. Lazarus, of New Orleans, told of the success of the Louisiana Association in inducing, this year, the Supreme Court to substitute one bar examining board for four so that there would be uniformity in this important work. The Court designates the five examiners upon the recommendation, or practically the appointment, of the association. The diplomas of three law schools have served to exempt their holders

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from examination, and now a movement is started to do away with the privilege.

Mr. Stewart Hanley of Detroit announced that the Detroit Bar Association would in due time invite the American Bar Association to meet in that city in 1924.

Concerning Americanization Week

The greater part of the evening session was devoted to an informal verbal report on preparation for Constitution Week by Mr. R. E. L. Saner, chairman of the American Bar committee on Americanization, and discussion arising therefrom. Mr. Saner told of encouraging news from General Pershing concerning observation of the occasion at army posts, of news concerning assistance from the moving picture industry, and of news as to observance on the part of public schools. Mr. Saner then moved a resolution recommending to the state and local bar associations represented that they co-operate with the national committee in furthering its plans in their own localities.

Speaking to the motion Judge Martin A. Lueck, of Milwaukee, said that the great need of the times is for education of the public to a need for a check on legislative power such as the courts exercise. He thought that the pending resolution should contain something which would wake up every lawyer in the land to the defense of our institutions against propaganda that is being spread.

Judge Lueck's views precipitated a spirited discussion. Senator Crawford (South Dakota) bitterly condemned the movement to limit the powers of the United States Supreme Court and asked for a rebuke for lawyers connected with it.

Mr. Wayne Dumont (New Jersey) said that the bar of his state should not be reproved because it had taken needed steps. Mr. Will A. Hayes (Milwaukee) declared that in the western states "a very considerable proportion of the bar are engaged in leading an attack upon the fundamentals of the constitution." He called for a great purging of the profession, based upon a better understanding of our institutions.

Mr. Julius Henry Cohen told of lectures delivered under the auspices of the New York Association of the Bar to enable its members to keep abreast of developments. He recommended a regular course of lectures on the constitution as a good way to meet the situation sketched by the preceding speaker.

Chairman Boston's advice that the resolution to be adopted contain no denunciation of the bar was supported by Mr. Harris, of Missouri. He would merely appeal to the profession to reconsecrate themselves to the promulgation and defense of the fundamental principles of our government, as a better means for inciting them to righteous action than by sending out a condemnation. He moved an amendment to the effect that the resolution appeal to all lawyers to co-operate with the American Bar Association in all the states. The resolution was thereupon unanimously adopted.

In an aftermath of talk on this absorbing subject Mr. William V. Rooker, of Indianapolis, told of his success in winning support for desirable institutions by making the facts entirely clear to the public. Mr. Mason and Mr. Teigen, of South Dakota, indicated that their state was not to be considered benighted, inasmuch as Senator Crawford was chairman of the Americanization committee there and was very active.

Bar Integration

It was late when the Conference was ready to take up the last item on its program, bar integration, to which Judge Clarence N. Goodwin has been assigned as speaker. His brief response follows:

The chairman of this meeting spoke rather apologetically about returning to the main business of this Conference, as though we were going to climb down from the exalted heights to which we have been taken by the eloquence of the gentlemen who discussed these questions of patriotism, and all that, down to the ordinary level of the work of the Conference. Now, I want to say that in my opinion this Conference, in working for a better administration of justice, is doing as much to inculcate respect for the government, respect for the constitution and for law, as all the oratory that can be expended on a long-suffering people. I am heartily in sympathy with this work which Mr. Saner and the others are doing, but it is not exclusively our work. In 1916 I had the pleasure and the honor of presiding at the opening session of a Conference where there were 700 different institutions represented, a Conference brought together for the purpose of national Americanization. Now let us divide this work a little, let us not attempt to drive all the energy of the American Bar Association and all the State and local bar associations to this particular work that is not wholly within our special field, but let us go in with all the rest of them and get the cooperation of these various institutions and at the same time save a little time for the *main work* of the American Bar Association and State and local bar associations, which is a *better mode of administering justice*, and thereby inspiring the people of the United States with a respect for law.

The Conference adjourned after the election of officers, which resulted as follows: Chairman, W. H. H. Piatt; vice-chairman, Julius Henry Cohen; treasurer, Nathan William MacChesney; secretary, Herbert Harley; members of the council to serve four years, Elihu Root and Charles A. Boston. The council members whose terms did not expire are: Thomas W. Shelton and Thomas J. O'Donnell, 1924; William V. Rooker and Stiles W. Burr, 1925; Clarence N. Goodwin and Jefferson P. Chandler, 1926. The next meeting will be held on the Tuesday preceding the first session of the American Bar Association (probably July 8, 1924) at an eastern city to be designated in January.

Appreciation of John Lowell

After the close of the meeting Mr. Julius Henry Cohen, who had been directed by a vote to draft a resolution expressing the appreciation of the Conference for the services of the late John Lowell, of Boston, presented the following draft resolution, which was made a part of the permanent records, and transmitted to Mrs. Lowell:

JOHN LOWELL was one of the founders of the Conference. He was a member of the very first committee of the American Bar Association which, under the title of "Co-operation among Bar Associations," planned the Conference. He was then a member of the Executive Committee of the American Bar Association. He became the natural liaison officer between the Association and the Conference. He interpreted the one to the other. He translated the Conference's ideas to the Association and the Association's to the Conference. He kept the two working in harmony. At each annual meeting, it was but natural that he should be chairman or a member of the Nominating Committee. Much is due to his wise guidance in the selection of officers. Always courteous, always reasonable, always fair, he won for his ideas their general acceptance, and won something more. He was loved—loved by everyone who knew him. Every delegate counted John Lowell as his friend. John Lowell leaves behind him in this Conference a memory as full of charm as it is of inspiration. We are the better because he was one of us.